Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE NEW YORK CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

ELSA GULINO, MAYLING RALPH and PETER WILDS, on behalf of themselves and all other similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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August 27, 2007

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QUESTION PRESENTED

Where the Courts have heretofore been unanimous in holding that licensing activity conducted outside the scope of an employer/employee relationship does not incur liability under Title VII, and where the Petitioner school district complies with State law by honoring state licensing examination requirements that Petitioner neither devises, implements, nor administers, and as to which Petitioner has no discretion, and where the challenged licensing test does not measure attributes appropriate to hiring decisions, did the Second Circuit err and create a split with other Circuits by holding that because Petitioner otherwise functions as the employer of New York City public school teachers, its compliance with challenged State licensing requirements subjects it to liability under Title VII?

PARTIES TO THE PROCEEDING

New York State Education Department, a party below, is being served as a respondent.

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit from which Petitioner seeks certiorari was decided on August 17, 2006. The opinion is reported at 460 F.3d 361 (2nd Cir. 2006), 2006 U.S. App. LEXIS 21297, and appears in the appendix at page 1a. Petitioner filed a petition for rehearing en banc. The Second Circuit denied that petition, which denial was entered on May 30, 2007. It appears in the Appendix to this Petition ("Appendix") at page 123a.

On September 4, 2004, following trial, the United States District Court for the Southern District of New York (Motley, U.S.D.J.) found for petitioners. That opinion is reported at 2003 U.S. Dist. LEXIS 27325. It appears in the Appendix at page 57a.

JURISDICTION

The Second Circuit issued its decree on August 17, 2006 (1a).[1] The Second Circuit then issued an order denying rehearing en banc on May 30, 2007 (123a). This Court has jurisdiction to review this judgment under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

A. Nature of Case

On November 8, 1996, plaintiffs brought a class action against Petitioner New York City Board of Education

[1] Parenthesized numbers followed by the letter "a" refer to pages of the Appendix of this Petition for a Writ of Certiorari.

("Petitioner" or "BOE") challenging the New York State law requirement that BOE was required to hire public school teachers from a pool of State licensed applicants who had passed certain statewide licensing examinations created, validated, and administered by the New York State Department of Education ("SED"). Plaintiffs asserted that statistical evidence showed an unintentional disparate impact in test pass rates for African-American and Latino teachers taking the tests, alleged that SED was liable under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, for establishing and administering these statewide licensing requirements, and that BOE was liable under Title VII for complying with State law requiring that local school districts hire teachers solely from pools of state licensed applicants. The District Court subsequently certified a plaintiff class consisting of African-American or Latino New York City public school teachers who either: (1) allegedly lost their New York City teacher's license and appointment as a regular teacher because of their failure to pass either of the two tests at issue, depending on the time frame, namely the NTE Core Battery Test ("NTE") or the Liberal Arts and Science Test ("LAST"); or (2) allegedly were unable to obtain or were delayed in obtaining a New York City license and regular appointment because they failed to pass either test.

B. Statement of Relevant Facts

There are 696 local school districts in New York State, of which the New York City district is one. Public school teachers in New York State are employed by these individual local school districts (5a-7a). The State, through the SED, exercises a licensing function by establishing minimum professional standards for public school teachers, thus

certifying that persons applying for jobs with local districts have attained at least the minimum degree of competency necessary to protect the public welfare (4a). These certification requirements apply to persons seeking to become or remain public school teachers anywhere in New York State. As regards New York City teachers, BOE is required to follow State law and to select from and hire only State-licensed applicants. N.Y. Education Law § 3001. Upon being hired, a BOE teacher may then be issued a City license, which is distinct from the State certification/licensing process.

Many members of the plaintiff class began working for BOE in the 1980s, at a time when the now-defunct Board of Examiners was BOE's licensing arm. At that time, a qualified applicant for teaching positions in New York City was given a conditional license by the Board of Examiners, provided he or she met "minimum requirements," and the individual then had five years to meet "maximum requirements." The license itself indicated that it was conditional and that it was subject to the holder's meeting minimum and maximum requirements by a date certain. Tr. at 230, 238, 868; Plaintiffs' Exhibit 1 at 5.[2]

At the end of the five-year period, if the maximum requirements had not been met, the license would terminate, although the individual could continue teaching under a valid substitute teachers' license, which had less stringent maximum requirements. Because of severe staffing shortages, particularly in certain subject areas and certain districts within New York City, substitute teachers may work as many hours

[2] Citations that are not followed by "a" refer to the record that was before the Second Circuit on appeal. "Tr." refers to the transcript of the trial in the District Court.

as regular teachers who have met all licensing requirements, including maximum requirements and certification requirements. Tr. at 239, 247-48, 926, 956, 1667

In 1984, the State began requiring that an individual pass the NTE as a condition for State certification. Because the City had separate licensing authority, City teachers were not required to be state certified, but BOE adopted the NTE to meet its substantial equivalency requirement. BOE and the State subsequently agreed that, because of staffing shortages in the City, BOE teachers would be given up to five years to achieve a passing score on this test. In addition, persons who had obtained a conditional New York City license, or a substitute's license, but did not obtain a full license because they had not passed the NTE could work as substitute teachers. SED Exhibit 17; BOE Exhibit N; Tr. at 1732.

In 1993, the SED began phasing out the NTE as a certification exam, and began phasing in the LAST in its stead. Since September 1996, the SED no longer uses NTE, and employs the LAST exclusively. Tr. at 2316.

During the 1980's, there were essentially two methods to obtain a valid New York City conditional teachers' license. First, a candidate could take an "open" examination, for which anyone who met the minimum requirements was eligible, and which consisted of a written English examination, multiple choice questions, and an oral interview. The alternative method to be a licensed teacher in New York City was to take and pass the "closed" examination, which consisted only of an oral interview, and which was open only to those who had given two or more years of satisfactory service as a substitute teacher. The closed examination was a creation of the State legislature in 1986,

and has since been repealed. Tr. 917-18, 1653-54. Chapter 572 of the Laws of New York, 1986, N.Y. Education Law § 2569-f.

Under the closed exam law, teachers who failed to attain maximum requirements in the five-year period, but who had initially obtained the City license via the open examination, were eligible to have their license restored. The statute, however, provided that persons who obtained the initial license through the closed examination were not eligible to have that license restored if it took them more than five years to attain maximum requirements. Tr. at 235-40, 918-19, 922-25.

The Board of Examiners was abolished by statute, effective January 1, 1991. At that point, BOE created a unit known as the Office of Professional Recruitment Assessment and Licensing to oversee City licensing issues. Tr. at 980, 1997.

The 1991 law also mandated that persons who were hired to perform services as a teacher in New York City had to have both State certification and a valid City license. Prior to the 1991 law, a person could teach in New York City with only a City license; State certification was not required. Even after 1991, however, it remained that a person who had a City license but lacked State certification could be maintained as a full-time substitute. Although substitutes may work the same hours as regular teachers, the contract between the United Federation of Teachers and BOE limits the salaries a substitute can receive. Tr. at 214-15, 242, 925 SED Exhibit 58(c)

Some of the plaintiffs aver that they had received regular New York City teaching licenses, but, because they failed to pass the NTE and/or the LAST those licenses were terminated and they were essentially "demoted" to the substitute position. Additionally, some plaintiffs allege that, although they were permitted to work as substitutes in New York City, they were precluded from obtaining regular teaching positions because they were unable to pass either the NTE or the LAST.

Neither the SED nor BOE placed any limits on the number of times a candidate or teacher could take the NTE or the LAST. Tr. at 1736-37; Tr. at 952. The NTE was available to be taken at least three times a year, and the LAST was available four times a year at first, then up to six times a year. Tr. at 1756. Neither the SED nor BOE would know if a reported score on the NTE was the teacher's first time taking the test, or from a subsequent time. Tr. at 1738. At the same time, candidates taking the NTE were given score sheets that gave them an indication of their strengths and weaknesses on the test, so they could prepare better for the next time they took the test. Tr. at 1955; SED Exhibit 36.

The SED set the passing score on both the NTE and the LAST. Tr. at 1965; Tr. at 949-50; Tr., at 1008, 1009. With respect to the NTE, the SED set the passing score lower than had been recommended in the validation study performed by Educational Testing Service, the test developer, specifically for use of tests in New York State. Tr. at 2306-07.

The LAST has been given by SED and National Evaluation Systems ("NES"), a contract test developer, since 1993. The test is administered and scored under the

supervision of SED, without any involvement by BOE. Tr. at 2674-75, 2697, 2777-78, 2800-01, 2824, 2852, SED Exhibits 496-503, 630-678, 8000. It consists of 80 multiple choice questions, 64 of which are scored, and one essay question designed to assess reading comprehension, writing skill, and analytical ability in the areas of mathematics, science and the liberal arts. SED Exhibit 485; SED Exhibits 606-629.[3] The essay portion of the test counts for 20 percent of the candidate's final score. Tr. at 2766. The SED and NES review scores after every administration of the LAST for purposes of doing an item review so that potentially inappropriate items can be removed from the test. Tr. at 2866-67.

C. Federal Jurisdiction of District Court

The District Court had jurisdiction of the original action herein pursuant to 42 U.S.C. §§ 2000e-2000e-17.

D. District Court's Opinion

Following a bench trial that extended over five months and resulted in 3,600 pages of trial transcript and the introduction of approximately 800 exhibits, many of which were in excess of 50 or even 100 pages in length, the United States District Court for the Southern District of New York, by order dated September 4, 2003, found in favor of the defendants (57a).

Although the District Court concluded that the tests in question have a disparate impact, the Court held that although defendants had demonstrated the formal validity of the NTE

[3] SED Exs. 606-629 were sealed by order of the District Court.

and had "shown that the LAST is manifestly related to the legitimate educational goals enunciated by SED" (120a).

With regard to the LAST, the District Court opined that "under the disparate impact standard enunciated by the Second Circuit in the 1970s and 1980s in relation to challenges to standardized testing – namely, formal validity," defendants would have failed to meet their burden of showing that the test is job-related. However, applying the standard enunciated in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) — which states that "employers are not required, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict actual on-the–job performance," — the District Court held that the LAST is manifestly related to the job of a New York City teacher (119a-120a).

The District Court also held that plaintiffs had failed to meet their burden of "offer[ing] a cost effective, practical alternative to the tests used by defendants in certifying teachers" (121a).

E. The Opinion of the United States Court of Appeals for the Second Circuit

By opinion and order (one paper) dated August 17, 2006, the U.S. Court of Appeals for the Second Circuit vacated the District Court's judgment and remanded the case for further proceedings (1a). The Second Circuit also dismissed the case as to SED on the ground that the State body is not the plaintiffs' employer and, consequently, cannot be liable under Title VII.

The opinion held, however, that BOE remains potentially liable in this action under Title VII. In the Second Circuit's opinion, cases holding that licensing activity, conducted outside of an employment context, does not fall within the ambit of Title VII do not apply to BOE because that body functions as plaintiffs' employer. The Second Circuit's analysis does not explain why BOE should be liable under Title VII for compliance with State law requiring a licensing test that BOE does not control or administer and that exists completely outside the scope of BOE's employment authority (39a-41a.).

The Second Circuit also considered the question of whether the LAST is job-related, in which case it would not violate Title VII. Without making any reference to the fact that the LAST is undisputedly a licensing rather than an employment test, the Second Circuit, citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 432 (1975), held to be applicable the rule that "employers have been given explicit permission to use job related tests that have a disparate impact, but those tests must be 'demonstrably a reasonable measure of job performance'" (44a-45a). The Second Circuit further looked to the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedure" ("EEOC Guidelines"), finding it to be "the most important source of guidance" (45a-47a). The EEOC Guidelines posit a distinction between tests that measure "content" (the "knowledges, skills, or abilities" required by a job) and those that measure "constructs" ("mental processes or traits, such as 'intelligence, aptitude, personality, commonsense, judgment, leadership and spatial ability.'"[4])

[4] The EEOC Guidelines quote from 29 C.F.R. § 1607.

Having set forth these separate areas of inquiry, the Second Circuit stated: "Consistent with a practical approach to test validation, one should not draw too bright a line between content and construct" (47a). The Second Circuit opined further: "Common experience tells us that jobs require, and employers should be able to test, a range of abilities, and we must adapt our inquiry to the realities of the testing process" (48a). Based on these considerations, the Second Circuit found the appropriate standard to be the five-part test for employment set forth in *Guardians Assoc. of New York City Police Dept. v. Civil Service Commission of City of New York*, 630 F.2d 79 (2nd Cir.1980), which employs the following criteria, *id.* at 95:

> (1) The test-makers must have conducted a suitable job analysis[;] (2) they must have used reasonable competence in constructing the test itself[;] (3) the content of the test must be related to the content of the job . . . [;] (4) the content of the test must be representative of the content of the job[;] and there must be) (5) a scoring system that usefully selects from among the applicants those who can better perform the job.

The Second Circuit further held that the District Court committed legal error by employing instead the standard articulated in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988), under which it is not necessary that the test predict actual on-the-job performance (49a-51a).

The Second Circuit also cited factual errors purportedly committed by the District Court but not relevant to the instant Petition (52a-54a).

It concluded its opinion by holding out the possibility that, despite the "pervasive lack of documentation" cited by the District Court, BOE might be able to meet the *Guardians* standard by means of "first-hand accounts of those involved in the validation process, as well as the studied opinions of certified experts" (55a). Accordingly, the Second Circuit vacated the judgment of the District Court and remanded for further proceedings consistent with the opinion.

F. BOE Petition for Rehearing En Banc.

Following the Second Circuit decision, the BOE filed a petition for rehearing en banc, dated August 31, 2006. The petition noted that the LAST is undisputedly a licensing examination rather than an employment test and argued that BOE's compliance with the State's licensing requirements has no connection with BOE's role as an employer. The petition further pointed to the conflict between the Second Circuit decision and the otherwise unanimous judicial consensus holding that licensing activity conducted outside of an employment context does not support a claim under Title VII.

By amended order entered on May 30, 2007, the Second Circuit denied the petition for rehearing (123a).

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision in this case shatters a consensus among the Circuits, which have heretofore unanimously held that licensing activity conducted outside of an employment context does not give rise to a cause of action under Title VII. The decision, moreover, stands in conflict with this Court's holding that it is not appropriate to

apply Title VII's validation standards to other contexts. Finally, a broad reading of the Second Circuit's unwarranted application of Title VII to licensing procedures for teachers potentially sets the stage for challenges under Title VII to all sorts of licensing tests to which that federal statute was never meant to apply.

The Second Circuit's holdings with regard to BOE's potential liability in this case and the standard to be employed with regard to licensing all flow from the undue weight given by the Second Circuit to the fact the BOE, separate and apart from its obligation to comply with State licensing requirements, serves as the employer of all New York City public school teachers. From that fact, the Second Circuit seems to have concluded that because BOE is required to hire from a pool of State-licensed teachers who have passed the LAST, the examination is an employment test rather than a licensing test and that BOE, in its capacity as the teachers' employer, is subject to Title VII liability in this case.

By failing to address the fact that the BOE's obligation to comply with State licensing requirements is separate from its status as employer, the Court's opinion stands at odds with the substantial body of case law holding that state-mandated licensing activity, when separate from employment authority, does not support a claim under Title VII. We have found no case in which Title VII's validation standards have been held applicable to a state-mandated licensing test when the state itself was not deemed the plaintiff's employer. To the contrary, federal case law is unanimous in holding that licensing activity, when not part of some broader control exerted by the licenser over licensees, does not give rise to a cause of action under Title VII. *See Fields v. Hallsville Independent School District*, 906 F.2d 1017 (5th Cir. 1990)

(Title VII does not apply to State certification exam administered to Texas teachers); *George v. New Jersey Bd. Of Veterinary Medical Examiners*, 794 F.2d 113 (3d Cir. 1986) (Title VII does not apply to New Jersey veterinary license); *Haddock v. Bd. Of Dental Examiners of California*, 777 F.2d 462, 464 (9th Cir. 1985) (Title VII "is not intended to apply to the kind of licensing activity in which the Board [of Dental Examiners] engages"; "history [of bill deleting from Title VII exemption for state government employers] is barren of any reference to state licensing agencies or the many persons licensed by them"); *Woodard v. Virginia Bd. Of Bar Examiners*, 598 F.2d 1345 (4th Cir. 1979) (Title VII does not apply to bar examination); *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975) (Title VII does not apply to the Georgia bar examination); *see also Camacho v. Puerto Rico Ports Authority*, 369 F.3d 570, 578 (1st Cir. 2004) ("under . . . Title VII, . . . state licensing and regulatory agencies generally are not regarded as employers vis-à-vis those whom they license and regulate"). Challenges to state licensing tests arise solely under 42 U.S.C. § 1983 and the Fourteenth Amendment. *See, e.g., Haddock, supra*, 777 F.2d 462 (9th Cir. 1985).

The Second Circuit, however, held that BOE is distinguishable from agencies, such as those with licensing power in the cases just cited, "that were *merely* licensing entities, unlike BOE which acts as plaintiffs' 'employer' in the word's ordinary meaning" [italics in original] (40a). The flaw in this reasoning is that BOE does not administer the LAST. The cases indicate that in order to be subject to Title VII, the agencies involved would have to possess a dual authority both as a licenser and as an employer. The administering of LAST by the State is neither a reflection nor an extension of the power exercised by BOE as an

employer. It is a function over which BOE has no power or discretion.

It is instructive to contrast BOE with the California Commission on Teacher Credentialing ("CCTC"), a state body found by the Ninth Circuit to be subject to Title VII liability with regard to a teacher certification test on the ground that the test was part of a broader pattern of authority exercised over the teachers by the CCTC. *AMAE v. California*, 231 F.3d 572 (9th Cir. 2000). The Ninth Circuit relied on the test for Title VII liability articulated by the D.C. Circuit in *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341 (DC Cir. 1973), *i.e.*, whether the entity in question exercises actual "control over access to the job market." *AMAE*, 213 F.3d at 581. Based on this test, the Ninth Circuit found that by "requiring, implementing, and administering the" the certification test, CCTC exercised the level of control that served as a predicate for Title VII liability. BOE, by contrast, neither requires, implements, nor administers the LAST. Those functions are exercised by the State. They never become incorporated into BOE's power or authority as an employer. To the contrary, because BOE does not administer the LAST and has no say as to its content, the test is a function over which BOE has no discretion or power whatever. The Second Circuit decision destroys the unanimous judicial consensus according to which licensing tests given outside the context of an employer-employee relationship do not give rise to a cause of action under Title VII.

Moreover, because the Second Circuit decision imposes a Title VII analysis on a context other than employment, it stands in contradiction to the jurisprudence of this Court, which, in rejecting the argument that disparate impact analysis should apply under the Fourteenth Amendment,

noted the undesirability of applying validation standards under Title VII to other contexts, including licensing. *Washington v. Davis*, 426 U.S. 229, 248 (1976).

The difference in context is further highlighted by the nature of the LAST itself. It is undisputed that the LAST is a licensing test (Tr. 3012), subject to the standards adopted by three independent organizations working jointly to establish standards for the measurement profession. These organization are American Educational Research Association ("AERA"), the American Psychological Association ("APA"), and the National Council for Measurement and Evaluation (NCME") (SED Exhibits. 120-22, 800, 801; Tr. 1310, 3010-15, 1905-09, 1911, 2104, 2213).

Candidates for licensure are not applying for a particular job; they seek qualification to practice within a particular field (SED Exhibit 800, pp. 21-27). Unlike employment tests, which are designed to predict performance to assist prospective employer in selecting from applicants for a specific job opening, licensure tests do not seek to predict performance. Instead, they establish whether a candidate possesses the competencies for minimal qualification within the broader profession (*Id.*; SED Exhibit 123, pp.34-35; Tr. 3011-20). The joint AERA/APA/NCME standards state (SED Exhibit 121, p. 64):

> Where employment tests may measure appropriately an individual's aptitude to learn a specific job, people who take licensure or certification tests have usually completed training and are seeking to be deemed qualified for a broad field, rather than for a specific job. The distinction has important implications for the content to be covered in licensing or certification tests.

Accordingly, action taken pursuant to State licensing requirements is a function completely different from hiring teachers to fill particular job slots. State certification is a threshold requirement applicable to all potential employees. The decision to hire or promote an employee is therefore based on factors not challenged in this lawsuit.

Failing to recognize that the LAST is exclusively a licensing test, the Second Circuit, in assigning Title VII liability to BOE, inaptly relied on *Guardians Association of New York City Police Dept. v. Civil Service Commission of the City of New York*, 630 F.2d 79, 105 (2nd Cir. 1980) (quoting 42 U.S.C. § 2000e-7)), for the proposition that "Title VII explicitly relieves employers from any duty to observe a state hiring provision 'which purports to require or permit' any discriminatory employment practice'" (39a). Because the LAST is a test related exclusively to licensing, not the selection of an applicant for a particular job, it follows that the requirement that prospective licensees must pass it is not a "hiring provision.' Nor is the requirement an "employment practice," discriminatory or otherwise. Thus, adherence to State licensing requirements does not fall within the rule stated in *Guardians*, and BOE cannot be found liable for engaging in a discriminatory employment practice under Title VII.

BOE is sued here for adherence to State-mandated licensing requirements that do not flow from its status as an employer. In this respect, BOE is indistinguishable from the various agencies found to have no Title VII liability because the licensing activity for which they were sued was not that of an employer. The underlying principle of these cases is that licensing activity, when conducted outside the scope of an employer's broader authority, does not give rise to a cause

of action under Title VII. By holding BOE to be potentially liable in this case, the Second Circuit had placed itself at odds with that body of case law and created a split in the Circuits.

The net effect of this Second Circuit determination is that BOE has been found to be potentially liable under an employment statute for following licensing requirements unrelated to the hiring and promotion of employees and mandated by State law. Because the SED has been dismissed from this case, BOE does not even have the option of impleading SED for the purpose of indemnification. Moreover, upon remand, BOE will find itself in the awkward position of being on its own to defend a licensing examination that it neither designs, administers, grades, nor validates, under a standard that was never intended to apply to licensing tests. While the Second Circuit has expressed a certain sympathy for the quandary in which BOE finds itself ("[W]e acknowledge the difficult situation that this creates for BOE" [41a]), it has failed to recognize that such a circumstance is not only absurd in itself but the result of legal error.

Finally, the Second Circuit's decision creates a dangerous precedent. A broad reading of the opinion potentially lays the groundwork for challenges to any number of licensing procedures for various professions. *See, e.g.*, N.Y. Education Law § 6524 (medical doctors); N.Y. Judiciary Law § 53(3) (lawyers); N.Y. Real Property Law § 441(1)(b) (real estate brokers). It is not plausible that the drafters of Title VII contemplated creating wholesale havoc in the area of licensing procedure. In the wake of the Second Circuit's decision, however, that prospect becomes a real danger.

CONCLUSION

For the reasons set forth, the City respectfully asks this Court to grant its petition for a writ of certiorari.

Respectfully submitted,

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August 27, 2007

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED AUGUST 17, 2006

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 03-9062-CV

ELSA GULINO, MAYLING RALPH and PETER WILDS, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

NIA GREENE,

Plaintiff,

v.

NEW YORK STATE EDUCATION DEPARTMENT,

Defendant-Cross-Defendant-Appellee,

BOARD OF EDUCATION OF THE NEW YORK CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendant-Cross-Claimant-Appellee.

January 24, 2005, Argued
August 17, 2006, Decided

SUBSEQUENT HISTORY: As Amended September 20, 2006.

Appendix A

JUDGES: Before: RAGGI and WESLEY, Circuit Judges, and DRONEY, District Judge.*

OPINION BY: RICHARD C. WESLEY

OPINION

RICHARD C. WESLEY, *Circuit Judge*:

Although this Court has long navigated "the complex realm of [employment] testing and test validation," *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 630 F.2d 79, 82 (2d Cir.1980), once again, we find ourselves in uncharted territory. This case asks us to decide whether the general knowledge test component of New York State's public school teacher certification program is racially discriminatory in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17. Furthermore, where, as here, the plaintiffs are public employees, the delicate issues of federalism and state police powers come into play in answering the threshold question of which of the defendants, if any, can be considered an "employer" for the purposes of Title VII analysis.

Plaintiffs-appellants, Elsa Gulino, Mayling Ralph, and Peter Wilds, represent a class of African-American and Latino educators in the New York City (the "City") public school system. The essence of their claim is that the New York State Education Department ("SED") and the New York City Board

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* The Honorable Christopher F. Droney of the United States District Court for the District of Connecticut, sitting by designation.

of Education ("BOE") have discriminated against these aspiring teachers through the use of two standardized certification tests, the National Teachers Examination Core Battery ("Core Battery") and the Liberal Arts and Sciences Test ("LAST") of the New York State Teacher Certification Examinations. After a long trial, the district court (Motley, J.**) found in favor of defendants, holding that, although the two certification tests had a disparate impact on the employment prospects of African-American and Latino candidates, defendants avoided Title VII liability because the tests are "job related."

We hold that the district court initially erred in holding that SED is subject to Title VII liability, but we affirm the district court's holding that BOE is subject to Title VII liability as appellants' employer. As to the merits of appellants' Title VII claim, we find both legal and factual errors in the district court's holding in favor of appellees. We are not convinced, however, that the judgment in favor of appellants is warranted as a matter of law. Consequently, we vacate the district court's judgment and remand for further proceedings in accordance with this opinion.

I

A

New York's Constitution imposes upon the State a duty to "provide for the maintenance and support of a system of

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** The Honorable Constance Baker Motley—civil rights activist, distinguished lawyer, and respected judge—passed away on September 28, 2005.

free common schools, wherein all the children of this state may be educated." N.Y. Const. Art. XI, § 1. This means that it is incumbent upon the State to provide, at a minimum, a "sound basic education" for the State's children. *See Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 48, 453 N.Y.S.2d 643, 439 N.E.2d 359 (1982); *see also Campaign for Fiscal Equity, Inc. v. New York*, 100 N.Y.2d 893, 905, 769 N.Y.S.2d 106, 801 N.E.2d 326 (2003) ("[A] sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society."). To carry out this command, the State has given the Commissioner of Education broad authority to "prescribe ... regulations governing the examination and certification of teachers employed in all public schools of the state." N.Y. Educ. Law § 3004.1; *see also id.* §§ 3001, 3002, 3005. Because the State government is, at bottom, responsible for a school's failure to provide a "sound basic education,"[1] oversight of the education system at the State level is to be expected.

However, this need for oversight must be balanced against the long-standing principle in New York State that

1. "Licensure is a state function." Testing Teacher Candidates: The Role of Licensure Tests in Improving Teacher Quality 35 (Karen J. Mitchell et al. eds., Nat'l Research Council, 2001) ("NRC Report"). The Department of Health, Education, and Welfare defined "licensure" as "[t]he process by which an agency of government grants permission to persons to engage in a given profession or occupation by certifying that those licensed have attained the minimal degree of competency necessary to ensure that the public health, safety, and welfare will be reasonably well protected." U.S. Dep't of Health, Educ., and Welfare, Report on Licensure and Related Health Personnel Credentialing 7 (1971).

public schools be controlled largely by local school boards. "[Article XI of the New York Constitution] enshrined in the Constitution a state-local partnership in which 'people with a community of interest and a tradition of acting together to govern themselves' make the 'basic decisions [of] . . . operating their own schools.' " *Paynter v. New York,* 100 N.Y.2d 434, 442, 765 N.Y.S.2d 819, 797 N.E.2d 1225 (2003) (quoting *Levittown,* 57 N.Y.2d at 46, 453 N.Y.S.2d 643, 439 N.E.2d 359). Thus, in each school district, the people of the district make "the basic decisions on funding and operating their own schools." *Levittown,* 57 N.Y.2d at 46, 453 N.Y.S.2d 643, 439 N.E.2d 359 (internal quotation marks omitted); *see also N.Y. Civil Liberties Union v. New York,* 4 N.Y.3d 175, 181, 791 N.Y.S.2d 507, 824 N.E.2d 947 (2005) (quoting *Paynter,* 100 N.Y.2d at 442, 765 N.Y.S.2d 819, 797 N.E.2d 1225).[2]

To insure this emphasis on local control, the New York legislature has, by statute, confided many of the public schools' operating decisions to the discretion of local school boards. For example, school boards approve yearly operating budgets,[3] set tax rates, and collect taxes to fund public school

2. The regulations of the Commissioner of Education require local school boards to "develop and adopt a district plan for the participation by teachers and parents with administrators and school board members in school-based planning and shared decisionmaking." N.Y. Comp.Codes. R. & Regs. . tit. 8, § 100.11(b).

3. School budgets in cities are generally subject to review by local legislatures and, in other areas, must be approved by district voters. New York City is an exception—there, the Mayor controls the school budget. *See* N.Y. Educ. Law § 2590-q.

budgets.[4] *See* N.Y. Real Prop. Tax Law §§ 1302-1342; *see also, e.g.*, N.Y. Educ. Law §§ 1608, 1716, 1804, 1906, 2503, 2554, 2601-a. School boards across the State negotiate labor agreements with unions representing district teachers and other school district employees, *see* N.Y. Civ. Serv. Law §§ 200, 201.11; N.Y. Educ. Law § 3011. This is also the case in New York City, where BOE and the United Federation of Teachers enter into collectively bargained agreements governing the employment of the City's public school teachers. *See, e.g.*, Steven Greenhouse, *In Contract Deal, Pay to Rise 10%, City Union Says*, N.Y. Times, July 14, 2006, at A6; *see also, e.g.*, Agreement Between The Board of Education of the City School District of the City of New York and United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO, *available at* http://www.uft.org/member/contracts/teachers_contract/. Local school boards have also been given broad authorizations to purchase, maintain, and sell property on behalf of a school; to provide transportation to and from schools; to select and provide text books and other learning materials; and generally, "[t]o have in all respects the superintendence, management and control of the educational affairs of the district." N.Y. Educ. Law § 1604.30; *see also generally* §§ 1604, 1709. "Although the New York State Department of Education has substantial responsibility for education in the State, the local school districts maintain significant

4. It is instructive, though not determinative, that, for the 1996-97 school year, the State's contribution to public school budgets amounted to only 39.9% of total funds. Local school districts provided 56% of all funding, and the federal government provided the remaining 4%. *See Campaign for Fiscal Equity*, 100 N.Y.2d at 905, 769 N.Y.S.2d 106, 801 N.E.2d 326.

control over the administration of local school district affairs." *Kramer v. Union Free Sch. Dist. No. 15,* 395 U.S. 621, 623, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

Most relevant to this appeal is that local school boards have been given the authority to "employ . . . as many legally qualified teachers as the schools of the district require" and "to determine the rate of compensation of each teacher." N.Y. Educ. Law § 1604.8; *see also id.* §§ 1709.16; 3012.1(a) (prescribing the teacher tenure process to be followed in certain school districts). This means that local school boards are also vested with the authority to enter into contracts with teachers that set forth "the details of the agreement between the parties, and particularly the length of the term of employment, the amount of compensation and the time when such compensation shall be due and payable." *Id.* § 3011.1. Thus, while some discretion has been taken from local school boards—e.g., the requirement that the teacher be "legally qualified" and that full-time teachers be given an opportunity for tenure-most of the day-to-day management of the affairs of public schools rests entirely with local school boards.[5] Nowhere in the State has the principle of "giving citizens direct and meaningful control over the schools." *Levittown,* 57 N.Y.2d at 46, 453 N.Y.S.2d 643, 439 N.E.2d 359, been

5. Nationwide, "[p]ublic school districts generally select their teachers from available pools of licensed candidates." NRC Report, *supra* note 1, at 47. That is, in almost every state, availability for employment is determined by statewide minimum standards, but the final decision to hire certified candidates rests with the local school district. *Id.* Local school districts may, and indeed often do, impose requirements above and beyond those imposed by the states. *Id.* at 44-47.

more meaningfully practiced than in the City of New York, where, until 1991, the establishment of teacher credentialing requirements fell largely on the BOE, *see* N.Y. Educ. Law §§ 2569-a to 2569-f (1990) (repealed by L.1990, c. 650, § 1, eff. Jan. 1, 1991).

B

For many years, the BOE was solely responsible for prescribing the credentialing requirements for City teachers. The minimum requirements were a four-year college degree, as well as passage of both a written and an oral examination administered by the City's own Board of Examiners. Once these minimum requirements were met, the candidate was granted a "temporary per diem certificate" (also referred to as an "initial certificate") allowing him or her to teach for one year. At the end of that year, the teacher could either apply for a renewal of the temporary per diem certificate, which would extend the license for one more year, or the teacher could try for a permanent city teaching license.

There were two ways of obtaining a permanent teaching license. First, an applicant could take and pass a second Board of Examiners' test more specific to the candidate's teaching area. The second test had both written and oral components and was designed to test a range of attributes, including an applicant's ability in written English, knowledge of specific subject matter, and ability to apply pedagogical knowledge. The "knowledge" portion of the examination tested content relevant to the teacher's field—i.e., a social studies teacher would not have to answer math questions, etc. Alternatively, an applicant could obtain a permanent teaching license by

passing the Core Battery—a general knowledge test intended for aspiring teachers—and then petition for a nomination to a teaching position. Those who took this second route could only be appointed to teach in certain City schools.

Although the City of New York was free to devise its own teacher credentialing programs, its autonomy was limited to some degree because New York City teachers have always had to meet certain state *minimum* qualifications. A former human resources director for the BOE, Marie DeCanio, testified at trial that, although an "actual [State] certificate was not required [,] . . . comparable background and experience was required" of City certified teachers. Tr. Trans. at 193.

In 1984, the State began requiring that all teachers (except those in New York City and Buffalo) take and pass the Core Battery in order to obtain an initial certificate. Passage of that test soon became a de facto requirement for City teachers as well because State Education law required that the BOE "adopt regulations for the licensure of teachers in the city that [were] substantially equivalent or not less than those required by the state," Tr. Trans. at 1725, and the BOE felt that it could not devise a test on its own that would satisfy the "substantially equivalent" mandate. Those teachers who had passed the first Board of Examiners' test would not have to take the Core Battery. However, there were many teachers with temporary certificates teaching in the City school system, and those teachers could not be permanently certified without passing the Core Battery. Because the City risked decertification of thousands of teachers, SED gave City teachers a five-year period in which to pass the Core

Battery. During this period, City teachers could continue to teach with their provisional licenses.

If a teacher did not pass the Core Battery within the five-year period, the teacher's provisional license was revoked. However, a teacher could still obtain a substitute teaching license, and many of the City's teachers who were de-certified at the end of the five-year period remained in their positions as substitutes. Concerned about a sudden glut of full time "substitute" teachers, the State passed a bill that allowed for a test, given by the City's Board of Examiners and only open to substitute teachers in New York City, which would allow the substitutes to obtain an initial certificate without passing the Core Battery. This test, called a "closed examination" because it was closed to all but those who had worked for at least two years as a substitute teacher in the City school system, consisted of only an oral examination. Ms. DeCanio testified that the closed examination "was really a test that was to get people who are working as sub[stitute]s to have an easier method into the system as the initial certificate, and then they would have to complete their [permanent license] requirements after that." Tr. at 239.

C

In 1987, SED Commissioner, Thomas Sobol, convened a task force to study the State's public schools and make recommendations to improve the system. In March 1988, the Commissioner's Task Force On The Teaching Profession published, "The New York Report: A Blueprint for Learning and Teaching," ("Task Force Report"), which made numerous recommendations for improving the public school system.

Appendix A

A large portion of the Task Force Report, titled "Teacher Preparation and Licensure," was dedicated to a discussion of ways to improve the quality of teaching that would be "in keeping with the needs of today's students or teachers." Task Force Report at 614. Specifically, that Report focused on concerns that teachers could be teaching in schools before they obtained their permanent teaching licenses, which could mean that students were being "taught by someone who lacks the necessary subject knowledge or teaching skills." *Id.*

Two related recommendations in the Task Force Report are relevant to this appeal. First, it recommended that teacher licensing should be done on a "statewide . . . system which will seek to guarantee that before teachers are allowed to work independently in a classroom, they will be thoroughly prepared for that important responsibility." *Id.* Thus, it was suggested that certification of teachers in New York City and Buffalo follow the same standards as the rest of the State. Second, in order to implement such a system, the Task Force recommended a "sequence leading to professional teacher licensure" that would include a "test of liberal arts knowledge." *Id.* The Task Force anticipated this test as one of the licensing requirements because of its members' collective belief that "liberal learning is essential to the education of a prospective teacher." *Id.*

In response to this report, the State passed legislation—effective January 1, 1991—requiring that all teachers licensed to teach in a public school in New York State be licensed under the same statewide standards. *See* L.1990, c. 650,

§ 1 (repealing N.Y. Educ. Law §§ 2569-a to 2569-f); 3004.[6] Thus, because the Core Battery was already a prerequisite for non-City public school teachers to obtain their initial certificate, it became a prerequisite for licensure of City teachers, too. However, teachers who did not (or could not) pass the Core Battery could still teach on a temporary license. These temporary licenses could be extended for up to three years, with extensions beyond that granted in exigent circumstances. In the City, where teacher shortages were still acute, many teachers were essentially permanently employed although they held only temporary licenses. Beginning in 1993, SED began to phase out use of the Core Battery and phase in use of the LAST, a test focused on general liberal arts knowledge. During this period, SED also began to urge BOE to push its teachers to satisfy all of the state-mandated licensure requirements, though the State was still granting temporary licenses to City teachers in large numbers to alleviate the City's shortages.

D

The LAST was developed jointly by SED and National Evaluation Systems ("NES"), a company with considerable experience developing statewide teacher licensing tests. While the Core Battery tested a range of knowledge, skills and abilities that were deemed necessary to being a competent teacher,[7] the LAST is used to test only an applicant's

6. That legislation also eliminated the City's Board of Examiners and transferred licensing responsibilities to the BOE.

7. Because appellants do not challenge on appeal the district court's finding that the Core Battery did not violate Title VII, there is no need to discuss that test's development and implementation.

knowledge of liberal arts and sciences. It is important to note, however, that the LAST is but one component of the New York State Teacher Certification Examinations ("NYSTCE"). The other requirements for certification include separate assessments of pedagogy and more specific content tests. Currently, those seeking permanent full-time employment as classroom teachers in New York State must now pass the LAST as one of the minimum requirements for attaining an initial certificate. (Converting an initial certificate into a permanent "professional certificate" involves a host of additional requirements not directly relevant to this appeal.)

The LAST itself is a pass-fail examination designed to test basic college-level content. The examination covers five basic areas: (1) "Scientific and Mathematical Processes," (2) "Historical and Social Scientific Awareness," (3) "Artistic Expression and The Humanities," (4) "Basic Communication Skills," (collectively, the "Multiple Choice Sections") and (5) "Written Analysis and Expression" (the "Essay Section"). In order to pass the exam, a test taker must score an average of 200 points on each of the sections. This equates to answering roughly two-thirds of the questions correctly on the Multiple Choice Sections and a score of three points (out of a possible five points) on the Essay Section. However, scoring of the LAST is "compensatory," meaning that a candidate may score below the "passing score" on a certain section and still pass the test if his or her performance on the remaining sections is sufficiently high.

Appendix A

II

Appellants commenced this action on November 8, 1996, claiming, *inter alia*, that SED and BOE violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17. In particular, the complaint alleged that defendants' use of the Core Battery and the LAST to certify public school teachers had a disparate impact on minority job seekers in violation of § 2000e-2(k). Plaintiffs seek back pay, a declaration that the use of the certification tests is unlawful, and an injunction barring further use of the certification tests. Following discovery, both defendants moved for summary judgment on various grounds, including that Title VII does not apply to them. SED argued that Title VII does not apply because it is not plaintiffs' "employer" for the purposes of Title VII. BOE maintained, on the other hand, that it is not liable because it is merely complying with a state law that requires it to de-certify teachers who failed to pass either the Core Battery or the LAST.

The district court denied defendants' motions, finding that both SED and BOE are subject to Title VII liability. *See Gulino v. Bd. of Educ. of the City Sch. Dist. of New York*, 236 F.Supp.2d 314 (S.D.N.Y.2002) (*"Gulino I"*), *modified*, 2002 WL 31887733 (S.D.N.Y. Dec.26, 2002). In concluding that SED is potentially liable, the court stated that, in the absence of a direct employment relationship, there are three tests for determining whether a particular defendant is an employer in the Title VII context.[8] *See id.* at 331-32. The district court found that because SED plays a significant role

8. For a discussion of the three tests, see *infra* at 22-32.

in the management of local school districts, it is subject to liability under the first of the three tests-the so-called "interference" test. *See id.* at 333. Having reached that decision, the district court declined to discuss the applicability of the other two tests. *Id.* at 332. The district court also found BOE to be subject to Title VII liability because, although BOE was "merely following the mandates of state law as articulated in the relevant statutes and regulations," *id.* at 333, Title VII precludes any employer from using discriminatory state law as a defense to liability, *id.* at 335. Thereafter, SED filed a motion seeking certification for an interlocutory appeal of this determination. The motion was denied by the district court. *Gulino v. Bd. of Educ. of the City Sch. Dist. of New York,* 234 F.Supp.2d 324, 325 (S.D.N.Y.2002).

The trial began in December 2002, spanned five months, filled over 3,600 pages of transcript, and included the testimony of 40 witnesses. The district court, applying traditional Title VII burden-shifting analysis, found in favor of the defendants. *Gulino v. Bd. of Educ. of the City Sch. Dist. of New York,* No. 96-8414, slip. op. at 34 (S.D.N.Y. Sept. 4, 2003) ("*Gulino II*"). The court first held that plaintiffs had presented sufficient statistical evidence of disparate impact to make out a *prima facie* violation of Title VII. *Id.* at 10-13. Defendants then presented evidence purporting to show that the examinations had been developed and tested to ensure that they were related to the skills and knowledge necessary for public school teachers. At the close of evidence, the court found that the Core Battery was job related and thus, that "the State's certification decisions based on that test was [sic] both valid and reliable." *Id.* at 15.

As to the LAST, the court found that defendants had failed to establish the "formal validity" of the LAST. *Id.* at 32; *see Guardians*, 630 F.2d at 95-105. Notwithstanding that finding, however, the district court—employing a standard it thought was required by the United States Supreme Court in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)—held that the LAST is job related "because of the coincidence of three factors: (1) the importance given to the ability to write an essay by those education professionals surveyed by NES; (2) the weight of the essay writing portion of the test; and (3) the fact that the majority of plaintiffs would have passed the LAST but for the essay writing portion." *Id.* (citations omitted). Having found that the LAST is job related, the district court entered judgment in favor of defendants. *Id.*

Appellants claim that the district court applied the wrong disparate impact standard, that the district court's factual conclusions regarding the weight of the essay portion of the LAST are clearly erroneous, and that the defendants "misused" the tests in making employment decisions as to "in service" teachers.[9] In defense of their victory below, both appellees renew their arguments that Title VII does not apply to them. We address appellees' claims first.

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9. Because we conclude that the district court's factual conclusions with respect to the weight of the essay portion of the LAST were clearly erroneous, we need not reach appellants' contention that the test was "misused." If appropriate, the district court may need to address this argument on remand.

Appendix A

III

A

Title VII makes it "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Consequently, the existence of an employer-employee relationship is a primary element of Title VII claims. *See Tadros v. Coleman*, 717 F.Supp. 996, 1004 (S.D.N.Y.1989), *aff'd*, 898 F.2d 10 (2d Cir.1990) (per curiam); *cf. Arbaugh v. Y & H Corp.*, __ U.S. __, 126 S.Ct. 1235, 1245, 163 L.Ed.2d 1097 (2006) (holding that statutory employee-numerosity requirement is an element of a claim under Title VII). Although Title VII provides definitions of both "employer"[10] and

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10. Title VII provides that:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other

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"employee,"[11] neither definition is particularly helpful in deciding whether an employment relationship exists. In such situations—i.e., where a definition is "nominal" or is otherwise unhelpful—the courts must look outside the statute for guidance. *See Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 323, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992).

Where a statute " 'uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' " *Comty. for Creative Non-Violence v. Reid,* 490 U.S. 730, 739-40, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989) (quoting *NLRB v. Amax Coal Co.,* 453 U.S. 322, 329, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981)). In particular, the Supreme Court has stressed that, "when Congress has used the term 'employee' without defining it, . . . Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Reid,* 490 U.S. at 739-40, 109 S.Ct. 2166; *see Clackamas*

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> than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. § 2000e(b).

11. Title VII provides a rather circular definition of "employee," stating that "[t]he term 'employee' means an individual employed by an employer. . . ." *Id.* at § 2000e(f).

Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444-45, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003) (applying federal common-law of agency to definition of "employee" under ADA); *Darden*, 503 U.S. at 323, 112 S.Ct. 1344 (ERISA); *Reid*, 490 U.S. at 743, 109 S.Ct. 2166 (Copyright Act of 1976).

In attempting to give guidance in that regard, the Supreme Court culled the following non-exhaustive, thirteen-factor list of considerations from federal case law and the Restatement (Second) of Agency:

> the hiring party's right to control the manner and means by which the product is accomplished . . . . [;] the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Reid, 490 U.S. at 751-52, 109 S.Ct. 2166. Although "[n]o one of these factors is determinative," *Reid*, 490 U.S. at 752, 109 S.Ct. 2166, "the common-law element of control is the principal guidepost that should be followed," *Clackamas*,

538 U.S. at 448, 123 S.Ct. 1673;[12] *see also Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 114 (2d Cir.2000); *Frankel v. Bally, Inc.*, 987 F.2d 86, 90 (2d Cir.1993) (citing *Spirides v. Reinhardt*, 613 F.2d 826, 831 (D.C.Cir.1979)). This Circuit has repeatedly looked to the "*Reid* factors" in analyzing employment relationships under

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12. The Court in *Clackamas*, in adopting a common-law based approach, was "persuaded by the [Equal Employment Opportunity Commission]'s focus on the common-law touchstone of control." *Clackamas*, 538 U.S. at 449, 123 S.Ct. 1673. In particular, the Court noted with approval the EEOC's six-factored test, which is based on the common law of agency:

> [1] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work[;]
>
> [2] Whether and, if so, to what extent the organization supervises the individual's work[;]
>
> [3] Whether the individual reports to someone higher in the organization[;]
>
> [4] Whether and, if so, to what extent the individual is able to influence the organization[;]
>
> [5] Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts[;]
>
> [6] Whether the individual shares in the profits, losses, and liabilities of the organization.

Id. at 449-50, 123 S.Ct. 1673 (quoting 2 Equal Employment Opportunity Commission, Compliance Manual § 605.0009).

Title VII. *See, e.g., Eisenberg,* 237 F.3d at 114; *O'Connor v. Davis,* 126 F.3d 112, 115 (2d Cir.1997).

In this Circuit, however, "courts turn to common-law principles to analyze the character of an economic relationship 'only in situations that plausibly approximate an employment relationship.' " *O'Connor,* 126 F.3d at 115 (quoting *Graves v. Women's Prof'l Rodeo Assoc.,* 907 F.2d 71, 74 (8th Cir.1990)). Thus, "a prerequisite to considering whether an individual is [an employee] under common-law agency principles is that the individual have been *hired* in the first instance." *Id.* at 115 (emphasis added). In determining whether a person has been "hired," we look primarily to "whether [a plaintiff] has received direct or indirect remuneration from the alleged employer." *Pietras v. Bd. of Fire Comm'rs of the Farmingville Fire Dist.,* 180 F.3d 468, 473 (2d Cir.1999) (internal quotation marks omitted). "Where no financial benefit is obtained by the purported employee from the employer, no plausible employment relationship of any sort can be said to exist." *O'Connor,* 126 F.3d at 115-16 (internal quotation marks omitted).

The district court, in holding that SED is subject to Title VII liability, neglected the common law-based analysis entirely. Instead, as noted above, the district court found that

> [t]here are three tests used to determine whether an entity qualifies as an employer in the Title VII context: 1) whether the defendant affirmatively interfered with or affected the plaintiff's direct employment or access to employment opportunities; 2) whether the defendant can be

> considered a "single" or "joint" employer together with the direct employer under standards borrowed from the National Labor Relations Board; and 3) whether the direct employer is merely an agent or instrumentality of the defendant for the purposes of the discriminatory practice. Plaintiffs assert that SED satisfies all three tests (even though it need satisfy only one).

Gulino I, 236 F.Supp.2d at 331-32 (citations omitted). The court settled on the first of the three tests-the "interference" test-and found that SED's extensive involvement in the affairs of local school districts brought SED within the ambit of the interference test. As discussed more fully below, we disagree with the district court's holding as to the applicability of the interference test, 18 and we reverse. Because we reverse on that issue, we must also address the two other putative tests for employer liability that the district court did not discuss. Having considered the other theories, however, we find that SED is not an employer under any view of Title VII, and we dismiss the Title VII claims against the State defendant.

B

The "interference" theory of employer liability was first enunciated by the D.C. Circuit in *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C.Cir.1973),[13] but the district

13. In *Sibley*, a male private-duty nurse, who was placed with patients through a hospital but who was paid directly by the patients, sued the hospital for preventing him from being referred to female

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court likened the present case to a more recent application of the theory-the Ninth Circuit's decision in *Association of Mexican—American Educators v. California*, 231 F.3d 572 (9th Cir.2000) (en banc) ("*AMAE*"). In *AMAE*, the Ninth Circuit endorsed the test from *Sibley*, holding that the state of California was subject to Title VII liability because, even though the state was not an employer in the traditional sense, it "interferes" with the employment relationship between public school teachers and the schools that hire them. *Id.* at 580.

The finding in *AMAE* of an indirect employment relationship was largely based on "the state's high level of involvement in the operation of local public schools." *Id.* at 582. The Ninth Circuit noted, "In California, public schools are 'a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the [state] constitution and the state Legislature is given comprehensive powers in relation thereto.' " *Id.* at 581 (quoting *Hall v. City of Taft*, 47 Cal.2d 177, 179, 302 P.2d 574 (1956)). The court also found it significant that "[California]'s involvement is not limited to general legislative oversight but, rather, affects the day-to-day operations of local public schools." *Id.* Furthermore, the

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patients on numerous occasions. *Sibley*, 488 F.3d at 1339-40. The Court of Appeals held that, although the plaintiff was directly employed by the patients, the hospital could be held liable under Title VII because the hospital "control[led] the premises upon which those services were to be rendered, including appellee's access to the patient for purposes of the initiation of . . . employment." *Id.* at 1342.

AMAE court found that the state's control over public schools is "plenary" to the point that "individual districts are treated as 'state agencies' for purposes of the Eleventh Amendment." *Id.* at 582 (citing *Freeman v. Oakland Unified Sch. Dist.*, 179 F.3d 846, 846 (9th Cir.1999)).

Judge Motley also briefly mentioned the Second Circuit's own foray into the hazy realm of the interference test: *Spirt v. Teachers Ins. and Annuity Ass'n*, 691 F.2d 1054 (2d Cir.1982), *vacated and remanded on other grounds*, 463 U.S. 1223, 103 S.Ct. 3565, 77 L.Ed.2d 1406 (1983). In that case, defendant TIAA managed a pension fund to which certain employees of Long Island University were required to contribute. The fund made higher retirement payments to male retirees based on the actuarial assumption that women typically live longer than men and would thus draw retirement benefits for a longer period of time. The defendant argued, *inter alia*, that it should not be held liable under Title VII because it was not the plaintiff's employer. The Court, in finding that the defendant could be liable under Title VII, held that there can be an "indirect" employment relationship where one party "significantly affects access of any individual to employment opportunities." *Id.* at 1063. Thus, this Court concluded, the defendant's policy of maintaining "sex-distinct mortality tables," *id.* at 1062, had a disparate impact on female employees, and defendant, as delegee of one of the employer's traditional employment functions, could be held liable under Title VII, *id.* at 1063.

In concluding that SED is subject to Title VII liability, the district court found that the state's involvement in setting baseline requirements for public schools—including

curriculum standards, graduation requirements, and, here, minimum requirements for a teaching license—was sufficient to bring SED within the scope of the interference test. We disagree. In our view, the district court's application of the interference test was wrong for three reasons. First, this Circuit has never adopted a broad reading of the *Sibley* interference test, and we decline to do so now. The district court's application of the interference test contravenes the plain language of Title VII and strays from basic tenets of statutory interpretation. Second, the district court's wholesale adherence to *AMAE* was misplaced because the linchpin of the *AMAE* majority's analysis—i.e., that the State of California has plenary control over the operations of its schools—has no corollary in this case. Third, this Circuit's decision in *Spirt* does not support the conclusion that the State should be held liable for the disparate impact of the certification tests.

1. Sibley *and the Interference Test*

The language of Title VII clearly delineates a liability regime: "It shall be an unlawful employment practice for *an employer* . . . to fail or refuse to hire or to discharge *any individual* [on the basis of membership in a protected class]." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). An expansive definition of "employer" contravenes Supreme Court precedent and fundamental canons of statutory interpretation. As Judge Gould's dissent in *AMAE* aptly states, "A natural reading of [42 U.S.C. § 2000e-2(a)(1)] suggests that the 'individual' it references is a potential, current, or past employee of the employer," and that a direct employment relationship "is the typical Title VII case." *AMAE*, 231 F.3d at 603 (Gould, J., dissenting) (collecting cases).

Beginning with *Sibley*, however, a number of courts have held that liability under Title VII encompasses not only employers in the traditional sense, but also those who interfere with an individual's access to employment opportunities. *See Sibley Mem. Hosp.*, 488 F.2d at 1341; *see also, e.g., AMAE*, 231 F.3d at 581; *Zaklama v. Mt. Sinai Med. Ctr.*, 842 F.2d 291, 294 (11th Cir.1988); *Doe ex rel. Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 422 (7th Cir.1986) *overruled in part, Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 488 (7th Cir.1996); *Armbruster v. Quinn*, 711 F.2d 1332, 1336 (6th Cir.1983) *abrogated in part on other grounds, Arbaugh v. Y & H Corp.*, __ U.S. __, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006); *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 722 (D.C.Cir.1978). The *Sibley* court premised this expansion on its belief that, because "one of Congress' main goals was to provide equal access to the job market," *Sibley*, 488 F.2d at 1341 (internal quotations omitted), Congress must have impliedly extended liability not only to direct employers but also to those who interfere with a direct employment relationship. We disagree with the *Sibley* court's expansive approach to interpreting the straightforward language of the statute.

Sibley's central reason for creating "interference" liability under Title VII was that 8 Congress intended a comprehensive solution to employment discrimination and that such a comprehensive solution must entail an expansive view of potentially liable parties. As evidence of this intent, the *Sibley* court cited the sections of Title VII that extend "interference" liability to employment agencies and labor unions based upon a "highly visible nexus with the creation and continuance of direct employment relationships between

third parties."[14] *Id.* at 1342. The court concluded that, because the defendant's "daily operations are of such a character as to have such a nexus," liability was properly extended to that defendant. *Id.*

This reading of Title VII, however, ignores the very language that Congress employed. Congress did not mention labor unions or employment agencies as *examples* of additional potentially liable parties under Title VII. Nor did Congress extend Title VII liability in a general way; rather, it limited the statute's additional liability to labor unions and employment agencies. *Cf. O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 86, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (holding that federal statutory scheme detailing what claims could be made against the FDIC when it is acting as receiver necessarily excluded claims not mentioned in the statute). Congress obviously considered a range of potentially liable parties apart from traditional common-law employers, and in so doing, decided that only these two additional groups would be included within the reach of Title VII. Absent some evidence that Congress intended otherwise, we conclude that all other parties with a similar "nexus" to a plaintiff's employment are excluded from the Title VII liability scheme. *See United States v. Smith*, 499 U.S. 160, 167, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991) ("Where Congress explicitly enumerates certain exceptions . . . additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); *Greene v. United States*, 79 F.3d 1348,

14. *See* 42 U.S.C. § 2000e(b)-(d) (defining "employer," "employment agency," and "labor organization"); *id.* § 2000e-2(a)-(c) (stating that each of these three entities may be held liable for engaging in unlawful employment practices under Title VII).

1355 (2d Cir.1996) ("The ancient maxim *expressio unius est exclusio alterius* (mention of one impliedly excludes others) cautions us against engrafting an additional exception to what is an already complex [statutory scheme]."). For the courts "[t]o create additional 'federal common-law' [types of liability] is not to 'supplement' this scheme, but to alter it." *O'Melveny & Myers*, 512 U.S. at 87, 114 S.Ct. 2048.

The *Sibley* court's view of Title VII might also raise additional constitutional concerns. The Supreme Court has warned that a Congressional intent "to alter the usual constitutional balance between the States and the Federal Government" must be "unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (internal quotations omitted). This requirement safeguards the sovereignty retained by the states in our federal system because it requires Congress to state clearly when and to what it extent "it intends to pre-empt the historic powers of the States." *Gregory*, 501 U.S. at 461, 111 S.Ct. 2395 (citations omitted). The rule has been employed in a wide range of cases in which federal courts are asked to define the reach of Congressional enactments that threaten to upset the delicate balance of federalism. *See, e.g., Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998) (whether ADA applies to state prisons); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (whether Bankruptcy Code displaced state laws relating to title in real estate); *Gregory*, 501 U.S. at 456, 461, 111 S.Ct. 2395 (whether ADEA applies to state law establishing mandatory retirement age for Missouri judges); *Hayden v. Pataki*, 449 F.3d 305, 323-24 (2d Cir.2006) (en banc)

(whether Voting Rights Act applies to state prisoner disenfranchisement laws).

"Providing public schools ranks at the very apex of the function of a State," *Wisconsin v. Yoder*, 406 U.S. 205, 213, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). The Supreme Court has acknowledged that "[p]ublic education, like the police function, 'fulfills a most fundamental obligation of government to its constituency,' " *Ambach v. Norwick*, 441 U.S. 68, 76, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979) (quoting *Foley v. Connelie*, 435 U.S. 291, 297, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978)), and that "public school teachers may be regarded as performing a task 'that go[es] to the heart of representative government,' " *Ambach*, 441 U.S. at 75-76, 99 S.Ct. 1589 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973)). Thus, there is little doubt that New York acts pursuant to its traditional police powers in performing a core state function-regulating the quality of public school teachers[15] Fortunately, we need not explore the legitimacy of *Sibley's* view of Title VII and

15. Indeed, Judge Motley noted, with regard to the Essay Section of the LAST, "It should go without saying that New York City teachers should be able to communicate effectively in both spoken and written English. Teachers who are unable to write a coherent essay without a host of spelling and grammar errors may pass on that deficiency to their students, both in commenting upon and grading the work they turn in. Defendants' decision to exclude those who are not in command of written English is in keeping with the legitimate educational goal of teaching students to write and speak with fluency." *Gulino I*, No. 96-8414, slip op. at 33. Although we overturn Judge Motley's decision for other reasons, we think her observation was eminently reasonable.

the constitutional concerns raised by the clear statement rule, for we are convinced that the statute does not apply to the State (and thus SED) in the context presented. We see no justification for embracing *Sibley's* reading of Title VII and its use of the interference test.

2. Factual Differences Between AMAE *and This Case*

Even if we endorsed *Sibley*, we still could not affirm the district court's wholesale application of *AMAE* because of key factual differences between this case and *AMAE*. The relationship between the State of New York and individual local school districts is very different than the state/local relationship outlined by the Ninth Circuit in *AMAE*. While the New York Constitution does impose ultimate liability on the State for providing a "sound basic education," the equally important tradition of local control of public schools suggests a measure of autonomy not present in California. Local school districts in the State of New York are not merely "agencies" of the State, and neither the Board of Regents nor the Commissioner of Education exercise plenary control over public schools. Rather, as we have already discussed above, the legislature of New York has specifically delegated much of the public schools' day-to-day operations-including, most importantly here, employment decisions-to the local school districts. While some public school policies come from SED, New York does not have the same "top down" approach to management of the public schools that motivated the Ninth Circuit's decision in *AMAE*. Thus, even if this Circuit were to follow the legal framework of *AMAE*, the factual

differences between the cases preclude reliance on that decision.[16]

3. Spirt *Does Not Support The District Court's Result*

Finally, we think that our decision in *Spirt,* limited in scope as it is, does not support the decision below. In *Spirt,* we enunciated a narrow rule based upon a unique factual posture: we held that, where an employer has delegated one of its core duties to a third party-in that case, Long Island University delegated responsibility for the administration of a retirement plan to TIAA-that third party can incur liability under Title VII. In so holding, this Court reasoned that "exempting plans not actually administered by an employer would seriously impair the effectiveness of Title VII." *Spirt,* 691 F.2d at 1063.

However, in *Nationwide Mutual Insurance Co. v. Darden*-decided in 1993, 11 years after *Spirt*-the Supreme Court ruled that the common-law should supply the definition of "employee" in the absence of a statutory definition. *See Darden,* 503 U.S. at 322, 112 S.Ct. 1344. As we have noted, the holding in *Darden* "eliminate[d] the chief rationale for employing a broader test in the context of anti-discrimination legislation-namely, that a more liberal construction would

16. *Compare Woods v. Cafiero,* No. 04-0695, 2005 WL 3871601, at *6 (N.D.N.Y. Feb. 7, 2005) (holding that school district in New York is not entitled to assert Eleventh Amendment immunity) *with AMAE,* 231 F.3d at 582 (citing *Freeman v. Oakland Unified Sch. Dist.,* 179 F.3d 846, 846 (9th Cir.1999) (holding that California's school districts are entitled to assert Eleventh Amendment immunity)).

better effect the remedial purposes of the . . . legislation." *Frankel*, 987 F.2d at 90. Since *Darden*, we have declined to adopt as broad a reading of the "interference" test as that advanced by the district court.[17] For example, in *Kern v. City of Rochester*, 93 F.3d 38 (2d Cir.1996), we held that a secretary for the Rochester branch of a firefighters' union was not an employee of the City of Rochester for the purposes of Title VII. *Id.* at 45. This Court found that *Spirt* was inapplicable because the union in *Kern*, unlike the university in *Spirt*, "ha[d] not delegated any of its employment responsibilities to the [third party]." *Id.*; *cf. Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir.1995) (holding that *Spirt* does apply in deciding whether a corporate parent is liable for the Title VII violations of a subsidiary).

Finally, the district court's broad reading of *Spirt* is doubtful in light of a number of recent decisions by this Court. *See Scaglione v. Chappaqua Cent. Sch. Dist.*, 209 F.Supp.2d 311, 315 n. 5 (S.D.N.Y.2002) (collecting cases). First, in our 2000 decision in *Eisenberg*, we held that "a decision on whether a worker is an 'employee' [rather than an independent contractor] requires the application of the common law of agency." *Eisenberg*, 237 F.3d at 113. As noted above, this Court has been careful to point out that "a prerequisite to considering whether an individual is [an employee] . . . is that the individual have been hired in the

17. We also note that the sweep of *Sibley* itself was curtailed in *Redd v. Summers*, 232 F.3d 933 (D.C.Cir.2000), in which the D.C. Circuit seemed to limit *Sibley* to situations where the alleged employer acts as "an intermediary between [people offering services] and [potential employers]." *Redd*, 232 F.3d at 941.

first instance." *O'Connor,* 126 F.3d at 115. In *Pietras,* we noted that evidence of an employment relationship under Title VII will generally turn on "whether [a plaintiff] has received direct or indirect remuneration from the alleged employer." *Pietras,* 180 F.3d at 473 (internal quotation marks omitted). We reiterated our adherence to the common law agency principles in our decision in *York v. Association of the Bar,* 286 F.3d 122 (2d Cir.2002), where we found that, "[i]n the absence of a clear contractual employer-employee relationship, a party claiming to be an employee under Title VII must come forward with substantial benefits not merely incidental to the activity performed in order to satisfy this Circuit's remuneration test." *Id.* at 126. All of these decisions are consistent with the Supreme Court's decisions in *Reid* and *Clackamas Gastroenterology Associates,* both of which require adherence to common law principles of agency in Title VII cases, *see Reid,* 490 U.S. at 740, 109 S.Ct. 2166; *Clackamas Gastroenterology Assocs.,* 538 U.S. at 444, 123 S.Ct. 1673, and a broad application of the interference test is plainly inconsistent with traditional principles of agency law.

Consequently, applying the appropriately narrow reading of *Spirt* to the facts of this case, we find no basis for holding the State liable. The party here with the clear direct employment relationship, BOE, has not delegated a core employer responsibility to SED. Rather, as discussed above, the State has merely imposed a regulation in exercise of its traditional state concern: teacher competence. Even if we could say that the State has delegated some responsibility to BOE, it would be BOE-the putative third party delegee-that would be liable under *Spirt.*

Appendix A

4. The Two Remaining Theories of Indirect Employer Liability

As noted above, appellants press two other theories of "indirect" liability—(1) the "single or joint employer" test, originally developed by the National Labor Relations Board, but adopted by the Second Circuit in the Title VII context, *see Cook*, 69 F.3d at 1240; and (2) the "instrumentality" test.

The "single or joint employer" test utilizes a four-factored analysis developed by the NLRB to determine whether two or more employers can be treated as one for purposes of assigning liability. *See id.* (identifying four factors as "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control"). In this Circuit, this analysis has been confined to two corporate contexts: first, where the plaintiff is an employee of a wholly-owned corporate subsidiary;[18] and second, where the plaintiff's employment is subcontracted by one employer to another, formally distinct, entity.[19] Extending this theory to cases involving the complex relations between levels of

18. *See, e.g., Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir.2000); *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358 (2d Cir.2000); *Sharkey v. Lasmo*, 992 F.Supp. 321 (S.D.N.Y.1998); *Balut v. Loral Elec. Sys.*, 988 F.Supp. 339 (S.D.N.Y.1997), *aff'd*, 166 F.3d 1199 (2d Cir.1998).

19. *See, e.g., Arculeo v. On-Site Sales & Marketing, LLC*, 425 F.3d 193 (2d Cir.2005); *see also, e.g., Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir.2003); *Clinton's Ditch Coop. Co. v. NLRB*, 778 F.2d 132, 137 (2d Cir.1985).

government would be impracticable and would implicate the same constitutional concerns that we discussed above in conjunction with the "interference" test. Consequently, we decline to hold SED liable under the "single or joint employer" test.

Appellants' second proffered theory is even less appealing. In advocating adherence to the "instrumentality" theory, appellants cite a footnote in *Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702, 718 n. 33, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), which merely states that agents of employers can be held liable under Title VII. This is common sense, and, indeed, Title VII itself explicitly recognizes that "any agent" of an employer will be liable for discriminatory behavior. 42 U.S.C. § 2000e(b). However, appellants do not claim that the BOE is an "agent" of the State. Instead, appellants claim that the State exercises a level of control over the BOE such that the State must be considered an employer under this agency theory. But this is, of course, merely a rehashing of the "interference" and "single employer" tests, and, in any event, it gets the "agency" liability analysis backwards. That is, Title VII liability applies to employers *or their agents,* and the State is clearly not an agent of BOE. Thus, we find that the so-called "instrumentality" test, to the extent that it is a separate theory of liability, does not apply here.

5. Applying The Common Law of Agency

This leaves us where the district court should have started—at the common law of agency. As detailed earlier, the Supreme Court has given us guidelines for discerning

the existence of an employment relationship: traditional indicators of employment under the common law of agency. Under this approach, the State is plainly not plaintiffs' employer for the purposes of Title VII liability.[20]

As an initial matter, plaintiffs fail to meet the threshold showing that SED hired and compensated them. *See O'Connor,* 126 F.3d at 115-16; *Pietras,* 180 F.3d at 473. While SED and the Regents set the baseline qualifications for fully licensed public school teachers, it is BOE who hired, promoted, demoted, and fired teachers in New York City. In fact, as detailed above, employment decisions have been delegated to local school boards by statute in New York. *See supra* at 6-7. The issues of the teachers' tenure, pay, and benefits are decided by BOE. Finally, while BOE receives some state funds, a portion of which may go to paying teachers, such an indirect source of funds cannot be the basis for Title VII liability.

Even assuming *arguendo* that plaintiffs could meet that threshold requirement, they would still need to show a traditional master-servant relationship under the multi-factored test from *Reid,* 490 U.S. at 751-52, 109 S.Ct. 2166. That standard focuses largely on the extent to which the alleged master has "control" over the day-to-day activities of the alleged "servant." The *Reid* factors countenance a relationship where the level of control is direct, obvious, and concrete, not merely indirect or abstract. For example, under the *Reid* test, an employment relationship would exist between a partner and an associate of a law firm but not

20. *See supra* note 4.

between the National Association of Securities Dealers and a stock broker. Plaintiffs in this case could not establish a master-servant relationship under the *Reid* test. SED does have some control over New York City school teachers-e.g., it controls basic curriculum and credentialing requirements-but SED does not exercise the workaday supervision necessary to an employment relationship.

Thus, we find that the narrow holding of *Spirt* does not apply in this case, and we also hold that there is no theory of agency that supports the district court's holding that SED is subject to Title VII liability. Consequently, we vacate that portion of the district court's November 22, 2002 judgment and order that all claims against SED be dismissed.[21]

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21. In addressing SED's argument that it is not an employer, appellants devote most of their argument to detailing the ways in which the State regulates public education. Of course, this information is irrelevant in light of our holding that the interference test does not apply. However, one argument is worth addressing because it is discussed briefly in both *AMAE*, *see AMAE*, 231 F.3d at 584, and the district court opinion, *see Gulino I*, 236 F.Supp.2d at 331. Specifically, appellants argue that the State cannot be engaged in a mere licensing activity because the LAST is required for public school teachers and not for private school teachers. While their arguments in this regard are unclear, it appears that appellants cite this distinction as evidence of the "plenary control" that the State has over its public schools. This argument is unpersuasive for several reasons.

First, as noted above, the extent of the State's interference is irrelevant if the State does not satisfy the common-law agency test for employer liability.

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Second, New York *does* regulate many aspects of its private schools. *See, e.g.*, N.Y. Educ. Law § 305.22 (requiring the Commissioner of Education to issue numbers to private and public school students alike for tracking purposes); N.Y. Comp.Codes. R. & Regs. tit. 8 § 200 (establishing standards regulating education of students with disabilities in private and public schools); *id.* § 100.2(p) (requiring private high schools to register with the Board of Regents in order to issue high school diplomas). Most importantly, New York law requires that privately educated students (including home schooled students) receive instruction that is from a "competent teacher" and that is "at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides." N.Y. Educ. Law § 3204.2; *see Paladino v. Adelphi Univ.*, 89 A.D.2d 85, 454 N.Y.S.2d 868, 872 (App.Div.1982). Nonpublic educators must be licensed, subject to yearly renewal, by SED "pursuant to the regulations of the Commissioner." N.Y. Educ. Law § 5004. These regulations require nonpublic schools to submit "data concerning the education, training, experience and other qualifications, including supporting documentation, of the administrative, supervisory and instructional staff of the school." N.Y. Comp.Codes R. & Regs. tit. 8, § 126.6. The decision to certify, or not to certify, nonpublic school teachers is made, by the Commissioner, "in the best interest of students." *Id.*

Finally, New York's decision to regulate public and private school teachers differently is reflective of the State's differing obligations with respect to public and private education. It is the State, and not the local school district, that is required by the New York Constitution to guarantee a sound, basic public education. Furthermore, the No Child Left Behind Act of 2001 required states to ensure that public school teachers possess a certain level of training and knowledge. *See* 20 U.S.C. § 7801(23); 34 C.F.R. § 200.56; N.Y. Comp.Codes R. & Regs. tit. 8, § 120.6. Naturally, these mandates

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Appendix A

C

Not surprisingly, the district court also found that BOE is an employer subject to Title VII liability. BOE argued in the district court that it should not be held liable for an employment practice required by state law. The court held that "Title VII preempts any state laws in conflict with it," *Gulino I,* 236 F.Supp.2d at 335 (citations omitted), and that, even though BOE was "merely following the mandates of state law," *id.* at 333, in using the LAST to certify teachers, it was nevertheless subject to Title VII liability, *see id.* at 335. BOE does not appear to challenge this finding of the district court; however, we note the district court was correct in holding that the mandates of state law are no defense to Title VII liability. As this court has previously held, "Title VII explicitly relieves employers from any duty to observe a state hiring provision 'which purports to require or permit' any discriminatory employment practice." *Guardians,* 630 F.2d at 105 (quoting 42 U.S.C. § 2000e-7 (1976)). On appeal, BOE appears to change its tack. Instead of arguing lack of discretion, BOE asserts that Title VII does not apply because BOE's use of certification tests for licensing "is a capacity separate and distinct from that of employer under Title VII." BOE Br. at 13. That is, BOE argues that, because it is merely

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require state-level oversight of public school teachers. The fact of differing regulatory schemes does not mean that the State is not acting pursuant to its inherent police powers; if anything, it is evidence that the State *is* acting pursuant to its police powers.

engaged in the licensing of teachers, Title VII does not apply.[22]

To support its claim, BOE relies almost exclusively on two cases: *National Organization of Women v. Waterfront Commission of New York Harbor*, 468 F.Supp. 317 (S.D.N.Y.1979) and *Lavender-Cabellero v. NYC Department of Consumer Affairs*, 458 F.Supp. 213 (S.D.N.Y.1978). BOE argues that these cases exempt the City from all Title VII liability for its licensing activities. Neither case, however, supports BOE's claim. Both cases involve organizations that were *merely* licensing entities, unlike BOE which acts as plaintiffs' "employer" in the word's ordinary meaning. In *National Organization of Women*, the Title VII challenge to the activities of the Waterfront Commission failed not only

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22. It appears that either BOE did not raise this argument below, or that BOE did raise it and the district court did not address the argument in holding that BOE is subject to Title VII liability. As an initial matter, we reiterate the "general rule" that "federal appeals courts do not consider arguments raised for the first time on appeal." *In re Lynch*, 430 F.3d 600, 605 (2d Cir.2005) (citing *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976)).

We would be able to say with certainty whether BOE had (or had not) raised this below if BOE had included in the record on appeal the memorandum in support of its summary judgment motion. Regrettably, the several thousand page appendix contains no trace of the arguments made by BOE below. This omission arguably violates federal appellate and local court rules, *see* Fed. R.App. Proc. 30 & 2nd Cir. R. 30, certainly wastes judicial resources, *see Kushner v. Winterthur Swiss Ins. Co.*, 620 F.2d 404, 407 (3d Cir.1980), and is ill-advised in a record-intensive case raising numerous important issues on appeal, *see Brown v. Artuz*, 283 F.3d 492, 502 (2d Cir.2002).

because the Commission was merely a licensing organization, but also because the Commission was created with consent of Congress to manage certain aspects of labor at the New York and New Jersey ports "[t]o loosen the stranglehold on port activities that criminals, racketeers and hoodlums had acquired." *Nat'l Org. of Women,* 468 F.Supp. at 319 (internal quotations omitted). The district court in that case found that Congress, in passing the bill authorizing the interstate Commission, did not intend to diminish the states' ability to fight crime and corruption by creating new avenues of Title VII liability. *Id.* at 321. The decision in *Lavender-Cabellero* is also inapposite to the case at bar. In *Lavender-Cabellero,* plaintiff challenged the City of New York's system for issuing licenses to process servers. *Lavender-Cabellero,* 458 F.Supp. at 214. The district court found that the City was merely licensing process servers and not employing them, much as, for example, a state medical board might license, but not employ, doctors. *Id.* at 215.

While we acknowledge the difficult situation that this creates for the BOE, Title VII requires this result. BOE is not merely a licensing agency; the cases on which BOE relies involve organizations whose *raison d'etre* is licensing. While SED's interest is in assuring the quality of teachers, it does not hire them. The purpose of BOE, on the other hand, is the education of students in the New York City public schools, and BOE hires and compensates teachers as a means of accomplishing that objective. Consequently, we affirm the district court's decision that BOE is an "employer" subject to liability under Title VII.

IV

What then of the merits of appellants' claim that the district court erred in finding that the LAST is job related and does not violate Title VII? "We review the district court's findings of fact for clear error and its conclusions of law *de novo.*" *Wilson v. Nomura Sec. Int'l, Inc.*, 361 F.3d 86, 89 (2d Cir.2004). After careful review, we find that the district court's decision was premised on both legal and factual error, and we vacate the decision and remand for further proceedings consistent with this opinion.

A

Congress has established that it is "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). That is, "Congress' primary purpose [in passing Title VII] was the prophylactic one of achieving equality of employment opportunities and removing barriers to such equality." *Connecticut v. Teal*, 457 U.S. 440, 449, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982) (internal quotation marks omitted). Thus, a plaintiff need not show that an employer intended to discriminate to state a claim under Title VII. Rather, "[a] prima facie violation of

[Title VII] may be established by statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities." *New York City Trans. Auth. v. Beazer,* 440 U.S. 568, 584, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979); *see* 42 U.S.C. § 2000e-2(k).

Disparate impact claims follow a three-part analysis involving shifting evidentiary burdens. The Title VII plaintiff bears the initial burden of establishing a prima facie showing of disparate impact. *See id.* § 2000e-2(k)(1). To do so, the plaintiff must first identify the employment practice allegedly responsible for the disparities, *see id.* § 2000e-2(k)(1)(B)(i); *see also Watson v. Ft. Worth Bank & Trust,* 487 U.S. 977, 994, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). The plaintiff must then produce statistical evidence showing that the challenged practice "causes a disparate impact on the basis of race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(k)(1)(A)(i). Once the plaintiff has established a prima facie case of disparate impact discrimination, the defendant has two avenues of rebuttal. First, the defendant may directly attack plaintiff's statistical proof by pointing out deficiencies in data or fallacies in the analysis. *See Dothard v. Rawlinson,* 433 U.S. 321, 331, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); *Watson,* 487 U.S. at 996, 108 S.Ct. 2777. Second, the defendant may rebut a plaintiff's prima facie showing by "demonstrat[ing] that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Though the terms "business necessity" and "job related" appear to have semantic differences, they have been used interchangeably by the courts. *See, e.g., Griggs,* 401

U.S. at 431, 91 S.Ct. 849 ("The touchstone [of Title VII analysis] is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). Finally, if the defendant meets the burden of showing that the challenged practice is job related, the plaintiff can only prevail by showing that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship." *Watson,* 487 U.S. at 998, 108 S.Ct. 2777 (internal quotations omitted).

The district court found that plaintiffs had made a prima facie showing of disparate impact. *Gulino II,* No. 96-8414, slip op. at 14. Appellees do not challenge this finding. The district court also found, however, that appellees had shown that both the Core Battery and the LAST were job related, and based on that finding, the district court entered judgment in favor of defendants. *Id.* at 21, 32, 34. Appellants now challenge only the district court's finding that the LAST was job related.

B

Though the job relatedness requirement has been defined as a "manifest relationship," *Griggs,* 401 U.S. at 432, 91 S.Ct. 849, and as "business necessity," *id.* at 431, 91 S.Ct. 849, the basic rule has always been that "discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being

evaluated." *Albemarle Paper,* 422 U.S. at 431, 95 S.Ct. 2362 (internal quotation marks omitted). This rule operates as both a limitation and a license for employers: employers have been given explicit permission to use job related tests that have a disparate impact, but those tests must be "demonstrably a reasonable measure of job performance." *Id.* at 426, 95 S.Ct. 2362.

"The study of employment testing, although it has necessarily been adopted by the law as a result of Title VII and related statutes, is not primarily a legal subject." *Guardians,* 630 F.2d at 89. Because of the substantive difficulty of test validation, courts must take into account the expertise of test validation professionals. *Id.* However, judges must also remain aware that reliance upon "the findings of experts in the field of testing" should be tempered by "the scrutiny of reason and the guidance of Congressional intent." *Id.*

There are two sources of expertise upon which the courts often rely in deciding whether a test has been properly validated. First, a court can look to the testimony of experts in the field of test validation. At trial, both plaintiffs and defendants introduced testimony of experts in the field of educational testing. The district court's extensive findings of fact show that the court relied heavily on these opinions in assessing the job relatedness of the challenged certification tests. Second, despite the usefulness of expert testimony, courts also need clearly established guideposts against which the reliability of the expert testimony can be evaluated. Perhaps the most important source of guidance is the Equal Employment Opportunity Commission's "Uniform

Guidelines on Employee Selection Procedures" ("EEOC Guidelines" or the "Guidelines"). *See* 29 C.F.R. §§ 1607.1-1607.18 (2006). The EEOC Guidelines are intended "to provide a framework for determining the proper use of tests and other selection procedures." *Id.* at 1607.1(B). Although it has been stressed repeatedly that courts are by no means *bound* by the EEOC Guidelines, courts rely on them because following the Guidelines promotes consistency in the enforcement of anti-discrimination law. That is, the Guidelines represent "the administrative interpretation of the Act by the enforcing agency" and are thus "entitled to great deference." *Griggs*, 401 U.S. at 433-34, 91 S.Ct. 849. But the EEOC Guidelines are not only the administrative agency's interpretation of Title VII's requirements for test validation, they also represent the opinion of experts in the field-i.e., the EEOC. Because of that, courts have relied on the EEOC Guidelines since the standards for disparate impact analysis were announced in *Griggs*. Thus, although we approach the Guidelines with the appropriate mixture of "deference and wariness," *Guardians*, 630 F.2d at 91, thirty-five years of using these Guidelines makes them the primary yardstick by which we measure defendants' attempt to validate the LAST.

The EEOC Guidelines draw a sharp distinction between tests that measure "content"-i.e., the "knowledges, skills or abilities" required by a job-and tests that purport to measure "constructs"—i.e., the "inferences about mental processes or traits, such as 'intelligence, aptitude, personality, commonsense, judgment, leadership and spatial ability.' " *Id.* at 91-92 (quoting 29 C.F.R. § 1607.14(C)). This distinction, however, goes beyond mere semantics; it has important legal consequences because content validation is

generally much easier to achieve than construct validation.[23] The result is that "[t]his content-construct distinction . . . frequently determines who wins the lawsuit." *Id.* at 92.

The problem with a sharp distinction is that "knowledges, skills or abilities" can look very much like "constructs." *See Id.* at 93 (citing research on the hazy distinction between content and constructs). Consistent with a practical approach to test validation, one should not draw too bright a line between content and construct; rather, content and construct represent a continuum that "starts with precise capacities and extends to increasingly abstract ones." *Id.* at 93. A test will not automatically be subjected to the rigors of construct validation merely because the examination purports to test abstract qualities. Instead, we have stressed that courts should take a "functional approach that focuses on the nature of the job" in analyzing the defendants' test validation procedures. *Id.* Where a test "attempts to measure general qualities such as intelligence or commonsense, which are no more relevant to the job in question than to any other job, then insistence

23. To demonstrate "content validity," the employer must introduce data "showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated." 29 C.F.R. § 1607.5(B); *see also id.* § 1607.14(C). To demonstrate "construct validity" on the other hand, the employer must introduce data "showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated." *Id.* § 1607.5(B); *see also id.* § 1607.14(D). "Developing . . . data [for construct validation] is difficult, and tests for which it is required have frequently been declared invalid." *Guardians*, 630 F.2d at 92 (collecting cases).

on the rigorous standards of construct validation is needed." *Id.* On the other hand, "as long as the abilities that the test attempts to measure are no more abstract than necessary, that is, as long as they are the most observable abilities of significance to the particular job in question, content validation should be available." *Id.* Common experience tells us that jobs require, and employers should be able to test, a range of abilities, and we must adapt our inquiry to the realities of the testing process.

Guardians laid out a five-part test for use in analyzing the content validity of an employment test:

> (1) [T]he test-makers must have conducted a suitable job analysis[;] (2) they must have used reasonable competence in constructing the test itself[;] (3) the content of the test must be related to the content of the job . . . [;] (4) the content of the test must be representative of the content of the job[; and] [there must] be (5) a scoring system that usefully selects from among the applicants*385 those who can better perform the job.

Id. at 95 (footnote omitted). This approach has the advantage of tracking the Guidelines standards while still allowing the courts to take a more functional approach to the analysis. In particular, this test frees the courts from having to draw sharp distinctions between "content" and "construct" or "knowledge" and "ability." *Id.* at 93-94.

C

In concluding that the LAST is "job related," the district court declined to apply the standard set forth in *Guardians. Gulino II,* 96-8414, slip op. at 32-33. Instead the district court found that "the Supreme Court lowered the bar for defendants in disparate impact suits" in *Watson v. Fort Worth Bank & Trust,* and that, under this allegedly lower standard, the LAST was properly validated. This conclusion was based upon "the coincidence of three factors: (1) the importance given to the ability to write an essay by those education professionals surveyed by NES; (2) the weight of the essay writing portion of the test; and (3) the fact that the majority of plaintiffs would have passed the LAST but for the essay writing portion." *Id.* (internal citations omitted). This holding was in error. *Watson* never lowered the bar for defendants; thus, *Guardians* is still the law in this Circuit. In addition, the court's factual conclusion about the essay portion of the exam is clearly erroneous.

1. District Court's Legal Error

The district court's decision regarding the job relatedness of the LAST was based on an erroneous reading of *Watson* and a misapprehension of the scope of that precedent. The district court quoted the following passage from *Watson* in arriving at its conclusion that *Guardians* is no longer the standard in this Circuit for assessing job relatedness:

> Our cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal "validation

> studies" showing that particular criteria predict actual on-the-job performance. In *Beazer*, for example, the Court considered it obvious that "legitimate employment goals of safety and efficiency" permitted the exclusion of methadone users from employment with the New York City Transit Authority; the Court indicated that the "manifest relationship" test was satisfied even with respect to non-safety-sensitive jobs because those legitimate goals were "significantly served" by the exclusionary rule at issue in that case even though the rule was not required by those goals.

Watson, 487 U.S. at 998, 108 S.Ct. 2777 (quoting *Beazer*, 440 U.S. at 587 n. 31, 99 S.Ct. 1355). Relying on that passage, the court concluded that, even though the LAST was not formally validated, it was obviously and manifestly related to the legitimate goals of the education department. The district court essentially read *Watson* as rejecting the need for any formal test validation in Title VII cases.

The district court's legal conclusion regarding *Watson* raises two concerns. First, it is not clear that the quoted portion of the *Watson* opinion purported to overrule earlier Supreme Court cases that require employers to conduct validation studies that are at least consistent with the EEOC Guidelines. We think that *Watson* as a whole is more reasonably read as simply pointing out that some tests measure abilities that are abstract, yet so clearly consistent with legitimate business needs, that formal validation may be either functionally impossible or inadequate as a measure of the test's job relatedness. The examples from *Beazer*

discussed in the quoted passage illustrates a subset of disparate impact cases in which the job relatedness of an employment practice is so patent that formal validation is unnecessary. Neither of those outlying examples are relevant here.

Second, courts should not rely on this portion of *Watson* because that language comes from a section of the *Watson* opinion that was joined by only four of the eight participating justices.[24] *See Watson*, 487 U.S. at 1000, 108 S.Ct. 2777 (Blackmun, J. concurring). While that portion of the opinion has persuasive force, this Circuit remains bound by the validation requirements expressed in earlier Supreme Court precedent, namely, *Albemarle Paper* and *Griggs*, and as interpreted by *Guardians*. Further bolstering that conclusion is the fact that this case is much more factually analogous to *Albemarle Paper* and *Griggs* than to *Watson*. *Albemarle Paper*, *Griggs*, and *Guardians* addressed the use of standardized tests in making employment decisions. *Watson*, on the other hand, addressed the applicability of Title VII to subjective employment practices, such as evaluations by superiors, in making employment decisions. The testing-related cases delineate the appropriate standard for assessing job relatedness.[25]

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24. Justice Kennedy took no part in the decision of that case.

25. While the district court did mention *Guardians* in discussing formal validity, it did not discuss the standard laid out in that case for assessing "content validity" of an employment test. Additionally, the district court treated the EEOC Guidelines and the *Guardians* standard as interchangeable. As discussed in this opinion, *Guardians*

(Cont'd)

Appendix A

2. District Court's Factual Errors

In any event, because the BOE fails to point us to record evidence supporting the district court's finding that the LAST was properly validated, we are obliged to vacate the district court's judgment for clear factual error. As we have already noted, the district court based its conclusion regarding job relatedness on "the coincidence of three factors: (1) the importance given to the ability to write an essay by those education professionals surveyed by the NES; (2) the weight of the essay writing portion of the test; and (3) the fact that the majority of plaintiffs would have passed the LAST but for the essay writing portion." *Gulino II*, 96-8414, slip op. at 33 (internal citations omitted). It is with respect to the last factor that the record is deficient.[26]

(Cont'd)
counsels against strict reliance on the validation standards set out in the Guidelines because the rigidity of those standards "is inconsistent with Title VII's endorsement of professionally developed tests." *Guardians*, 630 F.2d at 92. We take this opportunity to reiterate our standard: "[A] validation technique for purposes of determining Title VII compliance can best be selected by a functional approach that focuses on the nature of the job." *Id.* at 93. We do not express any view on the district court's determination regarding job relatedness under *Guardians*. Rather, because the district court incorrectly applied the *Watson* standard, and because the court did not clearly apply the correct legal standard under *Guardians*, we remand for further fact-finding in light of the clarified legal standard.

26. We are, of course, mindful that our esteemed departed colleague, the Honorable Constance Baker Motley, brought unparalleled experience to the task of evaluating discrimination
(Cont'd)

Appendix A

The NES data on test scores is broken down by content and by demographics. The data in the record spans from March 1993 to July 1999. Some background generalizations about scores and race bear mentioning. Between 1993 and 1999, the average pass rate for white test takers ranged from 91% to 94%, while the average pass rate for African American candidates ranged from 51% to 62%, and the average pass rates for Latino candidates ranged from 47% to 55%. All candidates tended to have the highest average scores on the section titled "Artistic Expression and The Humanities," and all candidates tended to have the lowest average score on the section titled "Written Analysis and Expression"—i.e., the "essay" section.

The district court's factual conclusions were clearly erroneous in several key respects. First, in many of the years, African American and Latino candidates in general averaged lower than passing scores on sections other than (and in addition to) the essay section. Thus, in those years, many candidates presumably would have failed the LAST even if they had achieved passing scores on the essay section. Second, in some specific instances involving individual plaintiffs in this case, the essay portion of the test appears not to have determined the outcome as concluded by the district court. On several tries, one of the named plaintiffs

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(Cont'd)

claims. Thus, even after oral argument, we invited appellees to point us to any evidence in the voluminous trial record, which explored numerous issues, to support the few disputed factual findings at issue on this appeal. Their inability to do so on one point related to the determinative effect of the essay portion of the LAST compels us to vacate the judgment and direct further proceedings.

failed multiple sections of the exam, such that a passing score on the Essay Section would not have been enough to pass the LAST. On the other hand, two of the plaintiffs failed exams despite having received a passing score on the Essay Section. Finally, the LAST employs a compensatory scoring regime so that a candidate who scores below the passing score on the essay section could still pass the exam by scoring higher on the other sections. Thus, strictly speaking, it is impossible for the test as a whole to be valid simply because one section is job related. That is, because higher performance on one section may compensate for lower performance on another, one particular section could never be the sole reason that a particular group fails the exam. Thus, even under the district court's reading of *Watson*, on the record presented to us, the job relatedness of one particular section cannot establish the job relatedness of the entire test.

3. The Pervasive Lack of Documentation

The district court concluded that the LAST could not be properly validated under the *Guardians* standard at least in part because of a "pervasive lack of documentation." *Gulino II*, 96-8414, slip op. at 28. Were we to agree, it might be appropriate to direct the entry of judgment on remand in favor of appellants. In fact, however, we are not convinced, as a matter of law, that such judgment is warranted in this case.

It was unquestionably proper for the district court to take into account the fact that NES and SED had either destroyed, or failed to maintain, documents relating to the extensive procedure allegedly employed to validate the LAST. This lamentable failure on the part of NES and SED has

considerably complicated an already difficult case.[27] But to the extent the district court appears to have concluded that the failure to produce documents was necessarily fatal to formal validation, we disagree.

It is well-established that "[j]ob relatedness cannot be proved through vague and unsubstantiated hearsay." *Albemarle Paper,* 422 U.S. at 428 n. 23, 95 S.Ct. 2362. Nevertheless, first-hand accounts of those involved in the test validation process, as well as the studied opinions of certified experts, may be sufficient, in some circumstances, to establish the validity of an employment test. This is true even though the EEOC Guidelines view documentation as a necessity if a defendant is seeking to convince a court that a test is "manifestly related" to the employment in question. As we have previously observed, we are not bound to follow the rigid strictures of the EEOC Guidelines "to the letter." Thus, without minimizing the heavy burden that defendant bears in seeking to validate a test without relying on documentary evidence, we cannot say that a lack of corroborating documentation necessarily dooms a defendant's claim of job relatedness.

Because of the identified factual and legal errors, a remand is necessary. On remand, a new judge will have clear

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27. Given the regularity of legal challenges to these kinds of tests, this failure to document the validation procedures is needlessly costly. In fact, the contract between NES and SED required NES to keep documents regarding the validation of the LAST, doubtlessly in anticipation of a case such as this. There was no testimony as to why these documents were destroyed (or never kept) in contravention of the contractual document retention policy.

guidance as to the legal standard operating in this Circuit. Remand is also appropriate because BOE is now the sole defendant and must tailor its defense to that position.

V

Consequently, we VACATE the judgment of the district court and REMAND for further proceedings consistent with this opinion. We stress that, on remand, the district court must apply this Circuit's standard for test validation, as described in *Guardians* and in this opinion. We also urge the court on remand to take into account the structure of the LAST, and how it is scored, when assessing the test's validity. Finally, SED is not properly subject to Title VII liability in this case, and we order that the Title VII claims against defendant SED be dismissed.

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED SEPTEMBER 4, 2003

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

96 Civ. 8414 (CBM)

ELSA GULINO, MAYLING RALPH, PETER WILDS, and NIA GREENE, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK; and NEW YORK STATE EDUCATION DEPARTMENT,

Defendants.

September 4, 2003, Decided
September 4, 2003, Filed

JUDGES: CONSTANCE BAKER MOTLEY, United States District Judge.

OPINION BY: CONSTANCE BAKER MOTLEY

OPINION

Appendix B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Motley, J.

The plaintiff class in this case is comprised of African American and Latino educators in the New York City public school system ("plaintiffs") who have either lost their teaching licenses or have been prevented from obtaining a full teaching license because of the requirement that they achieve a satisfactory score on one of the challenged tests, the National Teacher Core Battery Exam (the "Core Battery") or the Liberal Arts and Sciences. Test of the New York State Teacher Certification Examination ("LAST"), the successor to the Core Battery. The tests were developed and administered by defendant New York State Education Department ("SED").

Plaintiffs alleged that the use of the tests as a requirement for obtaining permanent teaching certificates has an impermissible disparate impact on African-American and Latino teachers in New York City public schools, in violation of Title VII, of the Civil Rights Act of 1964, § 701 *et seq.*, as amended, 42 U.S.C. § 2000e *et seq.* Plaintiffs also alleged that white test-takers passed both tests at a rate that is statistically significantly higher than the rates for African Americans and Latinos. Plaintiffs further alleged that the tests in question were misused and do not measure whether the test-takers are qualified to be teachers. Many of the plaintiffs have remained employed as teachers with defendant New York City Board of Education ("BOE" or "the Board"), some in the same classrooms teaching the same subjects. They have asserted, however, that they have suffered harm in that they

have had their salaries reduced and have been denied employment opportunities, rights and benefits.

The parties to this action presented their evidence during an epic bench trial that lasted more than eight weeks and filled over 3,600 pages of trial transcript. This decision constitutes the findings of fact and conclusions of law of the court.

For the reasons that follow, although the court finds that defendants have not demonstrated that the LAST was properly validated according to professional guidelines and standards, the court does find that both the Core Battery and the LAST are job-related. Accordingly, the court finds for defendants.

INTRODUCTION

Disparate impact suits follow a three stage paradigm, as explained in multiple Supreme Court cases: (1) plaintiff must prove that the challenged practice has a disparate impact on a protected group; (2) once that showing is made, the burden shifts to defendant to demonstrate that the challenged practice bears a "manifest relationship to the employment in question"; and (3) if the defendant meets its burden, it prevails, unless plaintiff can offer an equally practicable, cost effective alternative practice which serves the same purpose as the challenged practice but does not result in the same disparate impact. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)); see also *Griggs v.*

Duke Power Co., 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971). Accordingly, these findings will follow that three stage structure.

FINDINGS OF FACT

Background: Teacher Certification and Testing in New York

1. Prior to January 1, 1991, teachers and prospective teachers in New York City were certified by the Board of Examiners of New York City, a City agency distinct from the Board. Tr. at 1668-69.

2. The license issued by the Board of Examiners for service in the New York City Board of Education schools on its face indicates that it is a conditional one, in that it is "subject to meeting minimum requirements" by a date certain and "subject to meeting maximum requirements" by a date certain, which is five years after the minimum requirements date. Pl. Ex. 1 at 5 (plaintiff Mayling Ralph-White's City license). See also Tr. at 238. On its face, the license also states that it "may be used for service as a substitute until such time as a teacher receives a regular appointment." Pl. Ex. 1 at 5.

3. Provided minimum conditions were met, there was no expiration date for the license. See Pl. Ex. 1 at 5. Because there was no expiration date and because the license stated that it could be used to perform substitute service, a person working under that license could teach full time as a substitute. Tr. at 868-69. Once maximum conditions for

licensure were met, the license could be used to obtain a position as a regularly appointed teacher in New York City. Pl. Ex. 1 at 4.

4. To obtain this conditional license, teacher candidates were required to pass either an "open examination" or, at certain periods of time, a "closed examination." Tr. at 195. The "closed examination" was created by State law in 1986, and the examination consisted only of an oral interview. See Tr. at 200-01, 234. This closed examination legislation was passed in response to a shortage of teachers in New York City. Tr. at 918. The "open examination" was available to all teacher candidates who had or were in the process of attaining a college degree; the test consisted of a content knowledge short answer section, a written English portion and an interview portion during which the candidate was asked questions pertaining to pedagogy. Tr. at 1653-58, 1662-63.

5. Only certain people were eligible to take the "closed examination"; the test was given only to those who had worked in the New York City public schools for two years as substitute teachers under a "temporary per diem certificate." Tr. at 200-01, 1656.

6. The temporary per diem certificate was created because of the severe teacher shortage and the need to fill classrooms with certified teachers. Tr. at 915. To obtain a temporary per diem certificate, teacher candidates had to write a 300 word essay and pass an oral examination. Tr. at 914. The holder of a temporary per diem certificate was eligible to teach for one year, and the license could be renewed again in subsequent years. See Pl. Ex. 1 at 1.

Appendix B

7. The closed examination was basically an interview test; Marie DeCanio, Senior Deputy Executive Director for Human Resources at the Board during the relevant time periods, testified that "it was really a test that was to get people who were working as sub[stitute]s to have an easier method into the system as the initial certificate, and then they would have to complete their five-year requirements after that." Tr. at 239.

8. If a teacher candidate met the requirements to take the closed examination and passed that examination, he or she would get a conditional City license, which would be no different than the conditional license granted to a person who had passed the open examination; each of these licenses would be subject to meeting minimum conditions by a date certain, and maximum conditions by five years later. See Tr. at 235-38; Pl. Ex. 1 at 5.

9. Teachers and teacher candidates who were going to receive a conditional City license as a result of a closed examination were notified in writing that the license that would "be issued subject to: . . . [m]eeting the eligibility requirements in full by" a date certain, which was five years after the notification that the license would be issued. Pl. Ex. 1 at 4.

10. There was one crucial distinction between persons who received their conditional City license via the open examination and persons who received that license via the closed examination: by State law, if a person passed the open examination and took more than five years to meet his or her maximum requirements, the City license could be restored;

but the City license of a person who passed the closed exam could not be restored if he or she took more than five years to meet his or her maximum requirements. Tr. at 956. In fact, the statute that established the closed examination declared that candidates who achieved their license via that route could not have the license reinstated if they failed to achieve maximum requirements in a timely fashion. Board Ex. L at 2.

11. Although the maximum licensure requirements included the tests at issue in this litigation, there were other maximum requirements that also had to be met in the same five-year period, including, for example, obtaining a Master's degree. Tr. at 199.

September 1, 1984: SED Imposes the Core Battery as a Requirement

12. City licensing standards have always been subject to State review and the City has always been required to meet State minimum licensing standards. Marie DeCanio testified that prior to January 1, 1991, "we were subject to state requirements that we had to at least meet [the State's] minimum" requirements, Tr. at 243-44, and that even when the "actual [State] certificate was not required[,] . . . comparable background and experience was required" of City Board teachers by SED. Tr. at 193. The State Education law additionally "required that the City Board . . . adopt regulations for the licensure of teachers in the city that [were] substantially equivalent or not less than those required by the state." Tr. at 1725. Whatever licensing requirements the Board adopted had to be approved by SED. Tr. at 1005; Board

Ex. N. Thus, under the statutory and regulatory scheme, SED "ha[d] the responsibility of establishing the qualifications for . . . the permanent certificate as well as issuing the certificate." Tr. at 1006.

13. State certification can be obtained on a provisional basis, meaning that the certification is good for five years, and on a permanent basis, meaning that the certification is valid for life. Tr. at 1710.

14. In September 1984, a SED regulation stated that: "All applicants for a provisional certificate must submit evidence of having achieved a level of performance satisfactory to the [State Education] Commissioner on examinations acceptable to the Commissioner." SED Ex. 17 at SED 145; Board Ex. N. The regulation declared:

> A license issued . . . by the superintendent of schools of the city school district of the City of Buffalo or of the City of New York shall be valid for service in any school district in the State for a position for which a comparable State certificate is required, provided such license has been issued upon qualifications which are at least substantially equivalent to those required for [State certification] . . . pursuant to these regulations. Comparability of the State certificate pursuant to these regulations and the certificate granted by such superintendents shall be determined by the [C]ommissioner [of SED].

Board Ex. N, P (j). This regulation also applied to persons who were seeking permanent State certification. SED Ex. 17 at SED 146.

15. There was a limited exception to this regulation, for teachers in New York City and Buffalo, in that teachers in those systems who were already "regularly licensed by the boards of education in New York City and the City of Buffalo as of September 1, 1984, [were] . . . not [required] to take the Core Battery Tests as long as the respective license [was] valid at the time of application for a State certificate." Id.

16. The Commissioner of Education is the chief executive officer of SED and is responsible for implementing the Regents' policy directives. Ed. Law § 305; Tr. at 3298. In its 1977 report, the Commissioner's task force on teaching recommended that teachers be, required to complete a broad course of study in the liberal arts and pass an initial licensing test in the liberal arts, noting that such a test would not be intended to predict teacher performance, but rather would test minimum competencies. SED Ex. 1 at SED 23; Tr. at 1898. Hearings across the state confirmed that better qualified teachers were needed to improve student performance. Tr. at 1731-32. This recommendation was consistent with a national movement emphasizing the value of a general education and knowledge of basic liberal arts for teachers. SED Ex. 800 at 14-15.

17. On April 24, 1981, the Regents instituted a liberal arts and sciences testing requirement for candidates seeking State certification on and after September 2, 1984. 8 NYCRR, § 80.2(q). Tr. at 1732. Because prior to January 1, 1991, New

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York City teachers were licensed exclusively by the City Board of Examiners and were not subject to State licensing requirements, this regulation did not apply to New York City. Ed. Law § 2590-j(2); Chapter 650 of the Laws of 1990; Tr. at 1724-25, 1736. The regulation delegated to the Commissioner the responsibility for selecting appropriate tests and setting the passing score. SED Ex. 11. SED contracted with Educational Testing Service (ETS) to assess whether the Core Battery would be valid for certifying New York teachers. Tr. at 2209-10, 2273-75; SED Exs. 10, 12.

18. In 1984, SED adopted the Core Battery as the test of the liberal arts and sciences for candidates for teacher certification. Tr. at 1732; SED Ex. 17 at SED 145. Prior to making its selection of the Core Battery, SED "reviewed several alternatives" and concluded that the Core Battery was "the only existing teacher-related test." Pl. Ex. 24 at GUL 01080. SED made this selection after a validity study had been conducted and the Core Battery "had been found valid for use in New York State as a certification examination." SED Ex. 17 at SED 145.

19. Once SED made this selection, administrators at the Board concluded that they were required to have their candidates for licensure also pass the Core Battery. Tr. at 232, 943, 1236, 1256, 1699. Dr. Charles C. Mackey, Jr., who held several different positions high up in SED's Office of Teaching during the relevant times, testified that SED's decision to use the Core Battery as a screening device was in effect imposed on the Board, even prior to the 1991 law that eliminated the Board of Examiners as the City's licensing arm:

> Q: But just to clarify, the state is responsible for setting the requirements, is that right, sir?
>
> A: Yes.
>
> Q: And that would apply even to people that are hired prior to 1991, is that right, sir?
>
> A: Well, in that the — in that the requirements for a regular New York City license would be akin to or the equivalent of what the state required at the time for a permanent certificate, the answer is yes.

Tr. at 1006-07.

20. Dr. Mackey further testified that the Core Battery and the LAST were the most appropriate tests to use to measure a candidate's knowledge of the liberal arts and sciences for purposes of achieving certification in New York State. Tr. at 2349. In other words, there was no "substantial equivalent" to the Core Battery prior to the creation of the LAST. SED told the Board that it was required to use the Core Battery. Tr. at 3483-84.

21. Following the State's imposition of the Core Battery as a minimum requirement for State certification, and therefore a minimum requirement for City licensure (except for those teachers who had already obtained a regular City license), in 1985 the City requested, by letter, permission from SED to have the Core Battery made a maximum licensure requirement. Pl. Ex. 30. The request asked SED to

> permit [the Board] to confer a license upon a candidate who fulfills all academic and professional requirements other than the Core Battery accomplishment, with the understanding that the license will be terminated upon failure to achieve whatever else is prescribed (including the Core Battery) within the five-year interval provided.

Pl. Ex. 30.

22. The City Board made this request because it did not want to require teacher candidates to take and pass multiple tests in a compressed time frame and also because the Board was facing difficulty in staffing teaching positions. Tr. at 254; Pl. Ex. 30. The Board also noted that it was sometimes forced to staff positions through the temporary per diem certificate, which was "clearly a less desirable vehicle for bringing in new personnel." Pl. Ex. 30.

23. SED granted the Board's request for a deferral of the Core Battery as a minimum requirement. Pl. Ex. 31. The agreement memorialized an understanding that the Core Battery would "be a minimum requirement with delayed implementation to allow [City] teachers to have a benefit of taking the test a number of times . . . [while] they could continue working." Tr. at 213.

24. In an internal 1989 memorandum, SED recited its understanding that the decision to require passage of the Core Battery by City teachers was a SED requirement, that the City had to ask the State's permission for a deferral of this

requirement and that City teachers who failed to pass the examination in a timely manner would be precluded from continued employment as a regular teacher. Pl. Ex. 32; see Tr. 973 ("It is a memorandum . . . indicating . . . the nature of the approval that had been or authorization that had been granted some four years earlier to the city to defer the requirement of the Core Battery, from the entry level to other requirements for regular licensure in the city").

Teacher Assignments in New York City: Before January 1, 1991

25. Persons who received their initial New York City license by taking the closed examination, because they were by definition substitute teachers already in the system, were typically placed in a vacancy in the school where they were serving as substitutes. Tr. at 1667. If there were no vacancy in that school, the district superintendent would place the person in another vacancy in the district. Id.

26. Persons who achieved their initial New York City license by passing the open examination were hired through a rank-ordered system, which matched job openings with the persons on the eligible for hire lists who received the highest test scores. Tr. at 1663. Eligibility lists were maintained for each test administration, and an eligibility list stayed open for seven years. Tr. at 1663-65. The City exhausted all available candidates on earlier lists before moving to later lists, but, within each list, the persons with the highest scores were considered first for open positions. Tr. at 1663-64.

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27. A candidate who declined an appointment was required to document the asserted good cause for their unavailability and could not decline an appointment merely because he or she did not want to teach in a particular [*17] school. Tr. at 1681. The declining teacher was required to establish that he or she met one of a limited number of acceptable reasons for declining: travel distance to assignment; caring for a child or sick family member; pregnancy; being under contract to a different school system; or having moved out of New York State. Tr. at 1681-83.

28. Teachers who declined positions without good cause were removed from the eligible list and lost the right to appointment, meaning that they would no longer be offered any position. Tr. at 1682-83. Such teachers, however, did not lose their New York City licenses, because they had a property right to those licenses. Tr. at 1683. Similarly, teachers who failed to achieve maximum licensure requirements would not lose their substitute teacher's license once they had met the minimum licensure requirements; they would, however, lose the chance to receive a regular appointment. See, e.g., Pl. Ex. 1 (fourth page).

29. It has always been the case, however, that, pursuant to State law, the City could not employ as regularly appointed teachers persons who did not meet the State requirements for teachers. Tr. at 214.

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Changes Effective January 1, 1991: Elimination of Board of Examiners; Elimination of Closed Examination; and State Certification Becomes a Minimum Requirement

30. Effective January 1, 1991, by State law, the Board of Examiners was eliminated as a licensing entity and its licensing responsibilities were transferred to the Board. SED Ex. 58(c) at SED 1898-1901, 1892. That law, Chapter 650 of the Laws of 1990, dictated that City licensure examinations would be an interview examination only. Tr. at 1669; SED Ex. 58(c). Under this same law, effective January 1, 1991, all teachers in New York State were required to obtain State certification. Tr. at 925. Thus, after that date, New York City teachers were required to have State certification in order to obtain a New York City license. See Tr. at 213-14, 242. This change, however, did not affect teachers who already had regular New York City licenses. Tr. at 214-15.

31. These teachers were not subject to State certification requirements — except as those requirements related to the individual teacher's efforts to attain maximum requirements for regular City licensure. See Tr. at 926; see also SED Ex. 17 at SED 146; Pl. Ex. 30. Accordingly, a person who had a license to teach as a substitute in New York City would continue to hold that license and be able to teach under that license, even though he or she lacked State certification. See Tr. at 214-15. Similarly, a person who was already a regularly appointed teacher and who possessed a full (as opposed to conditional) New York City license did not have to obtain State certification and could maintain his or her appointment. SED Ex. 58(c). Teachers who held only a conditional New York City license, however, would be required, under the

State regulation, to obtain State certification. See SED Ex. 17 at SED 146.

32. Further, as a result of this law, the Core Battery, in effect, became a minimum requirement for State certification. Tr. at 213-14. Once passage of the Core Battery became, again, a minimum requirement for State certification, it became a minimum requirement for City licensure, pursuant to SED regulations. Tr. at 213-14.

Creation of ORPAL

33. In late 1990, in anticipation of the January 1991 legislative change, the Board created an office, known as the Office of Recruitment, Personnel, Assessment and Licensing ("ORPAL"), which was responsible for, among other items, monitoring the status of teachers' efforts to achieve maximum requirements for licensure. Tr. at 980, 1997-70; see Pl. Ex. 273. The ORPAL office implemented a change in record-keeping and converted manual records into computerized ones, in order to keep track of a teacher's progress toward meeting maximum requirements. Tr. at 870.

34. Candidates who first applied for a City license after January 1, 1991 and who possessed State provisional certification were placed on a qualifying-eligible list, which was an alphabetical listing (as opposed to the rank order list that had been created under the Board of Examiners tests). Tr. at 1670. As was the case with the Board of Examiners' lists, teacher candidates had a right to stay on this list for seven years. Tr. at 1669. Names were drawn at random from the post-January 1, 1991 list to fill vacancies. Tr. at 1669-70.

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35. Based on "grandperson" provisions in the January 1, 1991 effective legislation, people who applied for City licenses before that date were not subject to the new assignment procedures and received preferential treatment over the new applicants who had passed the Core Battery certification examination and received State provisional certification. Tr. at 1671-72. Persons who applied pre-1991 were maintained on the rank order lists and, when a position opened up, ORPAL went through all the rank order lists in an attempt to fill that vacancy, before it considered people who were on the new pool list. Id.

36. As with the pre-1991 rules, a person could not decline an appointment to a school because he or she did not want to work there. Tr. at 1690. If a person declined an appointment to a particular school, his or her name would be removed from the list of prospective teachers in the system and could only be restored to that list if he or she agreed to go to a comparably difficult-to-staff school. Tr. at 1690-91.

State Temporary Licenses

37. After the 1991 law, a teacher candidate in New York State, including New York City, could still teach without having passed the requirements for State certification, including achieving a passing score on the Core Battery, provided he or she had a State temporary license. Tr. at 925-26. A State temporary license could be renewed up to three years, although this period was extended in certain instances. Tr. at 889. Temporary licenses have been renewed repeatedly because of the severe teacher shortage in New York City. Tr. at 929.

38. Because State certification had become, by law, a requirement for all teachers as of January 1, 1991, after that date the State took "a more visible active role in monitoring the employment status, the licensure status of teachers in the city." Tr. at 979, 1006-07.

39. In 1991, the City began applying for temporary State licenses on behalf of many of the City's teachers, so that they could teach in the City system. Tr. at 926. The City found it necessary to apply for these temporary licenses in large numbers. Id. The severe shortage of qualified teachers in New York City has led to the City seeking renewals on temporary licenses, because the alternative would be that classrooms would go unstaffed. Tr. at 247-48.

40. In order to obtain these temporary licenses, the Board was required by SED to certify that: (1) there were no certified teachers available to teach in the particular school or district where the temporary license was to be used; and (2) the teacher proposed by the Board was working toward State certification. Tr. at 928. The individual teacher was required to sign the temporary license application and to indicate that he or she was working to achieve full State certification. Tr. at 2324, 929; SED Ex. 812.

Enforcement of the Core Battery/LAST Requirement

41. During the years leading up to 1991, SED repeatedly contacted the Board and reminded it to make sure that teachers had satisfied requirements for full, regular licensure. Tr. at 979-80. This effort on the part of SED became more pronounced as the City began to apply for temporary licenses

in greater numbers. Id. Simultaneously, ORPAL's efforts to mechanize its records, and therefore enable greater accountability, began to show results. See Pl. Ex. 273.

42. Teachers were often given additional time, beyond the five-year period announced on their conditional license, to achieve maximum requirements, primarily as a result of ORPAL's efforts to mechanize its records. Compare Pl. Ex. 1 (fifth page)(named plaintiff's license expired in May 1994 by its own terms), with Pl. Ex. 273 (same named plaintiff given until June 1995 to show that she had met maximum requirements).

43. In 1993, SED began to phase out the use of the Core Battery and phase in the use of the LAST. Tr. at 2316. Teachers could take either test to satisfy the requirement. Tr. at 660. SED decided which teacher titles were eligible to take .either of these examinations. Tr. at 2351. As a result of SED's decision, many teachers could pass either the Core Battery or the LAST to satisfy their maximum requirements for certification. Tr. at 2316.

44. SED directed the Board to take action with respect to teachers who failed to timely achieve maximum licensure requirements. Tr. at 2350.

PART I: PLAINTIFFS' PRIMA FACIE CASE

45. Plaintiffs and SED each retained a statistical expert who testified with respect to the differences in pass rates on each of the tests. Dr. Thomas A. DiPrete, testified on behalf of plaintiffs. Tr. at 462-576. Dr. Joan Haworth testified on

behalf of SED. Tr. at 2465-2566. The LAST's Disparate Effect

46. Among people employed in the City's public schools, the difference in pass rates between White and African-American first-time test-takers of the LAST was statistically significant at more than fifty-nine standard deviations, Tr. at 480-81; Pl. Exs. 222, P22 at 12; Pl. Ex. 222, App. I, Table A12 at 22-23, and the difference in pass rates between White and Latino first-time test-takers was statistically significant at more than sixty-five standard deviations. Tr. at 481; Pl. Exs. 222, P22 at 12; Pl. Ex. 222, App. I, Table A12 at 22-23.

47. Among people employed in the City's public schools, the difference in pass rates between White and African-American test-takers — looking at whether test-takers ever passed the LAST — was statistically significant at more than eighteen standard deviations, Tr. at 499-500; Pl. Ex. 227, App. Table 14 at 46, and the difference in pass rates between White and Latino test-takers was statistically significant at more than nineteen standard deviations. Tr. at 500; Pl. Ex. 227, App. Table 14 at 46.

48. Among test-takers across the State, the difference in pass rates between White and African-American first-time test-takers of the LAST was statistically significant at more than seventy-five standard deviations, Pl. Ex. 222, P20, at 11-12; Pl. Ex. 222, App. I, Table A10 at 22, and the difference in pass rates between White and Latino first-time test-takers was statistically significant at more than seventy-five standard deviations. Pl. Ex. 222, P20, at 11-12; Pl. Ex. 222, App. I, Table A10 at 22.

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49. Among test-takers across the State, the difference in pass rates between White and African-American test-takers — looking at whether test-takers ever passed the LAST — was statistically significant at more than forty-two standard deviations, Pl. Ex. 227, App. Table 12 at 44, and the difference in pass rates between White and Latino test-takers was statistically significant at more than forty-three standard deviations. Pl. Ex. 227, App. Table 12 at 44.

The Core Battery's Disparate Effects

50. Among people employed in the City's public schools, the difference in pass rates between White and African-American first-time test-takers of the Core Battery was statistically significant at more than eleven standard deviations, Tr. at 478-79; Pl. Exs. 222, P15 at 9-10; Pl. Ex. 222, App. I, Table A7 at 20-21, and the difference in pass rates between White and Latino first-time test-takers was statistically significant at more than twelve standard deviations. Tr. at 479; Pl. Ex. 222, P15 at 9-10; Pl. Ex. 222 App. I, Table A7 at 20-21.

51. Among people employed in the City's public schools, the difference in pass rates between White and African-American test-takers — looking at whether test-takers ever passed the Core Battery — was statistically significant at more than thirty-six standard deviations, Tr. at 495- 97, Pl. Ex. 227 at 34, and the difference in pass rates between White and Latino test-takers was statistically significant at thirty-seven standard deviations. Tr. at 497-98; Pl. Ex. 227 at 34.

52. Among test-takers across the State, the difference in pass rates between White and African-American first-time test-takers of the Core Battery was statistically significant at more than thirty standard deviations, Pl. Ex. 222, P12 at 8; Pl. Ex. 222, App. I, Table A5 at 18, and the difference in pass rates for White and Latino first-time test-takers was statistically significant at more than thirty standard deviations. Pl. Ex. 222, P12 at 8; Pl. Ex. 222, App. I, Table A5 at 18.

The Four-Fifth's Rule

53. Section 4(D) of the Equal Employment Opportunity Commission's Uniform Guidelines (the "Uniform Guidelines") provides that a selection rate for a protected group that is greater than four-fifths of the rate for the highest group will generally not be regarded by federal enforcement agencies as evidence of adverse impact. However, such differences may constitute adverse impact where they are significant in both statistical and practical terms. 29 C.F.R. Section 1607.4(D). This guideline is referred to as the "Four-Fifths Rule." Dr. DiPrete testified that the "Four-Fifths Rule" is not a measure of disparity that is commonly used in the scientific or academic community. Tr. at 488.

54. The pass rates on the Core Battery for African-American and Latino test-takers are less than four-fifths of the pass rates for White test-takers with regard to all of the groups Dr. DiPrete considered in his report. Tr. at 491-492, 2543-45, 2544; Pl. Ex. 222, P25 at 13.

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55. The pass rates on the LAST for African-American and Latino first-time test-takers are less than four-fifths of the pass rate for White test-takers. Tr. at 491-492, 2545-2546, 2553; Pl. Ex. 30 Wyo. 366, 222 P25 at 13. Moreover, with respect to eventual pass rates on the LAST, the disparities in those pass rates have both statistical significance (at more than eighteen standard deviations as noted above), and practical significance for those populations. Dr. Haworth testified that if the eventual pass rates on the LAST had been as high for African-American and Latino teachers in City schools as it has been for White teachers, more than one thousand additional African-American teachers and more than several hundred additional Latino teachers would have passed the LAST. Tr. at 2550-2553.

56. The differences in pass rates on the Core Battery between White test-takers and African-American and Latino test-takers, respectively, also have practical significance. Dr. Haworth testified that if African-American test-takers had the same pass rate as White test-takers, approximately 2,000 additional African-American test-takers would have passed the Core Battery; if Latino test-takers had the same pass rate as White test-takers, approximately 2,000 additional Latino test-takers would have passed the Core Battery. Tr. at 2546-2550.

57. Accordingly, this Court finds that under the Four-Fifths Rule, the LAST and the Core Battery have an adverse impact on African-American and Latino teachers.

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Defendants' Rebuttal

58. Dr. DiPrete testified that it was appropriate to analyze the pass rates of first-time test-takers because there were adverse consequences to not passing the tests, even on the first try. Tr. at 485-86. He concluded that, since passage of one of the tests was a necessary step in becoming certified, a teacher who failed the test was clearly worse off than one who passed and therefore suffered adverse consequences from failing the test for this reason alone. Tr. at 485-86, 520-21. By contrast, Dr. Joan Haworth, SED's expert, testified that in determining whether the tests have a disparate impact, she focused on whether test-takers ever passed the tests. Tr. at 2486. She based her preference on her assumption that there were no adverse consequences to failing the Core Battery or LAST on the first or subsequent tries, so long as the individual eventually passed one of the tests. Tr. at 2484-2486; 2540-41. Dr. Haworth's "ever pass" analysis, however, is based on erroneous assumptions and is neither reliable nor credible for the reasons explained in the following paragraphs.

59. There are a number of adverse consequences to each failure of the tests. A person who failed either of the tests had to pay a fee each time he or she retook the tests, as well as an annual fee for issuance or renewal of a State Temporary License. Tr. at 2354. Although Dr. Haworth admitted that the payment of additional fees constitutes an adverse consequence of failing the tests, she did not consider this fact in her analysis. Tr. at 2536-37; 2541.

60. In addition, some class members who failed either of the tests had their licenses revoked and were demoted to substitute status, Tr. at 963-65; 1221-22; Pl. Ex. 273, with an attendant decrease in salary of between $ 2000 and $ 20,000 per year. Tr. at 906-907.

61. After 1990, other class members had to pass either the Core Battery or LAST in order to receive provisional state certification and to be eligible for a regular license from BOE. Tr. at 884-85. Without a City license, a teacher is ineligible for a permanent appointment and tenure and therefore cannot advance up the salary scale and accrue seniority in the City School District. Tr. at 885-887. In addition, teachers without City licenses are required to apply for an annual State Temporary License in order to continue teaching and are eligible to teach only if they are nominated to fill a vacancy in a shortage area for which certified teachers are not available. Tr. at 887, 245, 2353-54.

62. There are also significant differences between the employment rights and benefits of certified teachers and those of substitute teachers. A certified teacher has a greater ability to advance on the salary scale than a substitute teacher, Tr. at 865, has priority for placement ahead of a substitute in the City School District, Tr. at 865, has greater system-wide seniority, Tr. at 866, and has the right to secure another full-time position in the district if her position is eliminated. Tr. at 865-66; SED Ex. 237, Art.17, PB at 105. If a school is in an excessing condition, a certified teacher can bump any substitute teacher and take her position. Tr. at 866; SED Ex. 237, Art.5, PC at 15-16, Art.17, PA(3) at 104. A substitute teacher's salary cannot exceed salary step 4A. Tr. at 866.

Although Dr. Haworth admitted that the loss of such rights is an adverse consequence from failing the tests, she did not take into account the loss of these rights in her analysis. Tr. at 2533, 2536.

63. Moreover, while Dr. Haworth acknowledged that an enhanced risk of losing one's job would be an adverse consequence of failing the Core Battery or LAST, she did not take this fact into account in her analysis. Tr. at 2535-36. Dr. Haworth did not consider the psychological injury suffered by teachers when they failed either of the tests even the first time. Tr. at 629, 2537.

64. Dr. Haworth's analysis is inconsistent with her own factual assumptions. Dr. Haworth assumed that teachers had a five-year period during which to pass either of the tests, and that there were no adverse consequences so long as the teacher passed within this period. Tr. at 2483-85. However, Dr. Haworth never did an analysis based on this five-year period. Tr. at 2539-41. Instead, she conducted her analysis as though a test-taker would have suffered no adverse consequences if he or she passed either of the tests at any time during the sixteen-year period from 1984 (for the Core Battery) and from 1993 (for the LAST) up to the year 2000. Tr. at 2538-39, 2546.

65. Given that the evidence shows both statistical and practical significance, this court finds that Dr. Haworth's testimony does not rebut the evidence of disparate impact with respect to the LAST and the Core Battery. Accordingly, the court finds that defendants' use of the tests had a significant adverse impact on African American and Latino teachers in New York City.

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PART II: JOB RELATEDNESS

66. Education measurement professionals consider whether an inference drawn from a test is valid by examining the evidence that the test measures what it is designed to measure. SED Ex. 800 at 27-32; Tr. at 3012-18, 425-26, 1123. In the instant case, the inference being drawn is whether a teacher possesses the knowledge and skills deemed necessary by the teaching profession and the Regents to be provisionally certified.[1] SED Ex. 800 at 29; Tr. at 3012-13. Experts' validity judgments are made based on an accumulation of evidence regarding how the test was developed, as well as post-administration statistics indicating its reliability. Tr. at 3011-20; SED Ex. 800 at 29-30.

The Core Battery Tests

67. The content evidence of the validity of New York's certification decisions based on candidates' passage or failure of the Core Battery tests, as well as the professional opinion of Dr. William Mehrens, SED's expert witness on testing and test validation, demonstrate that the State's certification decisions based on that test was both valid and reliable.

68. ETS's teacher certification testing program was overseen by the National Teacher Exam Policy Council (the "NTE Policy Council"), a group of 12 teachers and education faculty members from across the Country, including one New York educator. Tr. at 1919-20, 3021; SED Ex. 10 at GUL 129.

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1. The definition of what inference is being made is further refined with reference to the issue of harm at P 147, supra.

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69. In the late 1970s, the NTE Policy Council decided to update its Common Examinations. The revised test series, the Core Battery, was developed from 1978 to 1982, and consisted of three separate two-hour tests in Communication Skills (including reading, writing and listening), General Knowledge (social studies, science, math, literature and fine arts), and Professional Knowledge (pedagogy). Tr. at 1913, 1917-20, 1933; SED 29 at E 418. The areas tested on the General Knowledge test were the same as those previously tested on the Common Examinations, plus a listening skills test and an essay test. Tr. at 1932-33.

70. Dr. Carolyn Massad, the ETS employee responsible for the initial development of the Core Battery tests, has a Ph.D. in educational psychology and is familiar with the AERA/APA/ NCME st

71. As part of the initial development, the NTE Policy Council commissioned papers regarding the knowledge and skills necessary for all teachers. Tr. at 1925-27. ETS collected a wide range of materials regarding teacher preparation and the teaching profession, including college course catalogues and articles from professional associations. Tr. at 1925, 1928, 1973; SED Ex. 29 at 422-425. ETS also collected materials for each of the content areas to be assessed and pedagogical resources regarding the methods of teaching each of the covered subjects. Tr. at 1929.

72. The NTE Policy Council convened advisory committees of experienced. educators for each of the three tests being developed. Committees were recruited nationwide through deans of education colleges, state licensing agencies

and professional education associations. Tr. at 1924, 1930-31. The General Knowledge test advisory committee consisted of ten content experts in science education, mathematics education, social studies education, and literature and fine arts education. Tr. at 1930. The advisory committees for the Communication Skills and Professional Knowledge tests each consisted of eight members with expertise in reading, writing and listening skills and pedagogical experience, respectively. Id. The advisory committees reviewed the literature and curriculum surveys and then developed "test specifications", a blueprint of the test content, which were then mailed out in survey form. Tr. at 1924, 1930-31, 1934, 3025; see test specifications in SED Ex. 20, App. E. Through this survey, approximately 3,000 educators nationwide provided input on the proposed Core Battery tests' content. SED Ex. 29 at E 418; Tr. at 1934-38, 2105, 3022-25.

73. In the course of the Core Battery tests' development, determinations were made regarding the level of difficulty of the tests. Tr. at 1927. For example, the level at which mathematics knowledge on the Core Battery General Knowledge test was measured was comparable to what would have been acquired by the completion of high school or possibly one year of college. SED Ex. 36 at 1754; Tr. at 1953. Statisticians and psychometricians assisted in determining the number of questions necessary to reliably assess an area of content knowledge or a skill. Tr. at 1927, 1933, 1938, 1940-41, 1974; SED Ex. 20, App. E - 12 -16; SED Ex. 21 at GUL 144.

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74. One hundred thirty-three subject matter experts were involved in drafting over 2,000 test questions ("items") for the Core Battery tests. SED Ex. 29 at E 418; Tr. at 1941-43, 1979, 3029-30. Each item was subjected to multiple reviews, including a "sensitivity review" by individuals trained to detect potential bias. SED Ex. 2; Tr. at 1944-47.

75. Following these multiple reviews, test questions were assembled into "test forms," which were subjected to further review. SED Ex. 2 at 5-7; Tr. at 1949-50, 1999. Each test form had a certain number of questions in common, called an "equating block", enabling ETS to ensure that each test form was of comparable difficulty. Tr. at 1948; 2277, 3044. In addition, entire test forms were periodically re-administered. Tr. at 1980-81. Pretests of the Core Battery test questions were then administered in approximately 200 teacher colleges in 49 states. SED Ex. 29 at E 418; Tr. at 2106.

76. The Core Battery test development process was fully documented at the time. Tr. at 1975 -77, 1998-99. There was a fire at the storage facility of ETS's storage contractor in the mid-1990s, however, and most of these documents did not survive. Tr. at 1923, 1969-70, 2301.

77. The Core Battery was first administered for teacher certification purposes in November 1982. Tr. at 1933; SED Ex. 10 at GUL 129. A set of three representative Core Battery tests was received in evidence as SED Ex. 329.[2] The Core.

2. SED Ex. 329 was sealed by order of this court to protect the secrecy of the test items.

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Battery tests were administered multiple times each year at various locations around the country. SED Exs. 17, 36; Tr. at 1950-5 1; SED Ex. 36 at E 1743. In 1988, twenty states used one or more of the Core Battery tests for teacher certification purposes. SED Ex. 36 at E 1767-1773.

78. The Core Battery tests were designed to determine whether teacher candidates possessed the academic knowledge and skills being assessed: "The NTE Programs tests are designed to measure academic preparation for teaching and not the act of teaching." SED Ex. 29 at E 417; Tr. at 1941, 2000. The Registration Bulletin described the test content, the level of difficulty of the content, how to register for the test and which states accepted the Core Battery for credentialing purposes. SED Ex. 36; Tr. at 1952-54. ETS also published guides to each of the Core Battery tests. SED Ex. 36 at 1753-54; SED Ex. 29 at E 419.

79. Following a test administration, a candidate was sent a score report indicating his or her performance in each content area, such as English, mathematics, science, social studies or literature and fine arts. Tr. at 1955. ETS retained test scores for five years and a candidate could ask that scores be forwarded to a state or other credentialing agency after taking the test and being advised of her score. SED Ex. 36 at E 1750.

80. Commencing in the mid-1980s, after each test administration, ETS performed a statistical analysis called Differential Item Functioning ("DIF") to determine whether different racial or ethnic groups performed differently on individual test items. Tr. at 1958-62, 1978-79; SED Exs. 191-94, 196-97.

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81. When registering for the test, candidates could elect to provide ETS with information such as where they had received their teacher preparation. SED Ex. 36 at E 1746. ETS used this information for statistical analyses of candidates' performance and research regarding its testing programs, including analyses of the factors associated with different performance levels on the Core Battery tests. SED Exs. 186-197; Tr. at 1956-57.

82. In March 1983, New York contracted with ETS to perform a validity study to ascertain whether the Core Battery tests were appropriate for use as New York State's initial teacher certification examination, Tr. at 2210, 2274-75; SED Exs. 10, 12, and to enlist the expertise of New York teachers and education college faculty members in calculating a proposed passing score for the consideration of the Commissioner of Education in the event that the Core Battery tests were adopted for use in New York. Tr. at 2209, 2213, 2268-69, 2273, 1966, 1968-69, 2190-91, 3038-56; SED Exs. 29 at E 418 and 36 at E 1750. This validity and standard setting study was conducted under the direction of Dr. Jane Faggen. Tr. at 2209-15. Dr. Faggen has a Ph.D. in educational psychology and is familiar with the joint APA/AERA/NCME standards. Tr. at 2203-05.

83. The appropriateness of the use of the Core Battery for certification in New York was determined through the participation of New York public school teachers and administrators and college faculty from New York teacher preparation colleges on three panels: Content Review; Job Relevance; and Knowledge Estimation. Tr. at 2215-19; SED Ex. 20, App. F-1. There were also separate panels for the

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Communication Skills and Professional Knowledge tests and for the four different parts of the General Knowledge test. Tr. at 2219, 2309; SED Ex. 20 at 2. Dr. Vincent Gazzetta, SED's Director of Teacher Certification, was SED's liaison with Dr. Faggen on the validity study. Tr. at 2216-18.

84. Dr. Gazzetta oversaw the recruitment and selection of panel members. He made significant efforts to recruit participation from a diverse group of educators - racially, ethnically, geographically, in terms of school district type, grade level, experience level and subject matter. Tr. at 2216-17, 2272; SED Ex. 20, Appendices B-34, C and D; SED Exs. 6, 13. Three hundred forty-one New York public school teachers, administrators and education college faculty members participated [*43] on the various panels, which met during the spring of 1983 at five different sites throughout the state. SED Exs. 13 and 20, App. D; Tr. at 2218-20.

85. Panel members were provided with a general orientation and were trained on their specific task. Tr. at 2237-38; SED Ex. 20, Appendices E - 23, F, G. They were instructed to carefully analyze the knowledge and skills being assessed in each question to consider whether the knowledge and skill being assessed "is important for the beginning teacher." SED Ex. 20 at E - 23; Tr. at 2238 -40; SED Ex. 10 at GUL 129.

86. The Content Review Panel, composed solely of teacher college faculty, assessed whether teacher candidates had the opportunity to acquire the knowledge and skills tested on the Core Battery tests in their teacher preparation programs. Tr. at 2219-29; SED Ex. 20 and App. E. This panel

determined that individuals attending New York teacher education programs would have been exposed to nearly all of the knowledge and skills assessed on the Core Battery. SED Ex. 20 Executive Summary and p. V.8 - 10; Tr. at 2230-33, 3042, 3430-31.

87. The Job Relevance Panel determined the relevance of the content knowledge and skills assessed on all three Core Battery tests to the job of a New York public school teacher. SED Ex. 20 at SED 195; Tr. at 2233. The Job Relevance Panel consisted solely of teachers and administrators in New York public schools. Tr. at 2219. For each test question on two test forms, the panel made a judgment whether the knowledge or skill being measured was "crucial," "important," "questionable" or "not relevant" to the job of a beginning teacher in New York. Tr. at 2233-35; SED Ex. 20 at SED 195 and App. F.

88. The Knowledge Estimation Panel consisted primarily of teachers but also included teacher educators. Tr. at 2219. Members of the Knowledge Estimation Panel made judgments as to the performance of a minimally knowledgeable entry-level teacher for the purpose of calculating a proposed passing score. The means by which these judgments were made and compiled into a collective passing score is referred to in the educational measurement field as the Angoff method. Tr. at 2242-43; Ex. 801 at 34. This is the most commonly used method for setting a passing score and meets generally accepted professional standards. Tr. at 1487-88; SED Ex. 801 at 11-18. Dr. Faggen conducted extensive training of the panel members about how to make the knowledge estimation judgment, and panel members

practiced and discussed such judgments prior to commencing this exercise. Tr. at 2243-53; SED Ex 20, G - 6-15.

89. The test question under consideration was projected onto a screen and panel members were asked to make an individual judgment about "the difficulty of individual test questions for persons who have the minimum level of knowledge and academic skills necessary for competent performance as a beginning teacher in New York State." SED Ex 20, G-4; Tr. at 2242, 2244, 2253-55. Panel members were asked to make a judgment about the knowledge possessed by a minimally knowledgeable entry-level teacher because the Core Battery tests were designed for use as certification tests, not to assess knowledge or skills which might be learned on the job. Tr. at 2244, 2247-48; SED 11 at GUL 167. It was understood that some individuals taking the test would already have teaching experience when they sought certification in New York State. Tr. at 2247, 2256; SED 10 at GUL 137. ETS then aggregated the judgments of all panel members into a raw total score and converted that into a scaled score in order to reach a study value passing score for each test. Tr. at 2260-62; SED Exs. 4, 21.

90. Based on the analysis and conclusions of the validity study and the recommendation of SED staff, in December 1983 Commissoner Gordon Ambach selected the Core Battery tests to be New York State's first teacher certification examinations. SED Ex. 11 at GUL 168; SED Ex. 14 at GUL. 141-42. As a result, persons who sought a provisional certificate as of September 2, 1984 in districts other than New York City and Buffalo were required to pass the Core Battery tests. SED Exs. 17, 19.

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91. The cut (passing) scores recommended by the study for all three Core Battery tests were presented to the Commissioner, with a list of educational considerations that might affect his final selection of a passing score, including the chance that a candidate who actually possessed the knowledge and skills being assessed might nevertheless fail the test or that a candidate who did not, in fact, possess the knowledge and skills would pass ("the standard error of measurement"), and the supply and demand for new teachers. Tr. at 3050-53; SED Ex. 20, V.22-23; SED Ex. 4 at 3-4. The Commissioner asked the Teacher Education, Certification and Practice Board (TECAP) to review the proposed passing scores. SED Ex. 4. TECAP endorsed the use of the Core Battery tests for teacher certification in New York, observing "that the Core Battery tests reflect general knowledge applicable to all areas of certification," and recommended that the passing scores be set at one standard error of measurement below the study value scores. SED Ex. 14 at SED 138-39; Ex. 4 at 3522-23. SED staff recommended that the passing scores be set at two standard errors of measurement below the study value scores. SED Ex. 16. In August 1984, the Commissioner set the cut score at two standard errors of measurement below the study value score. Tr. at 2306-07, 3050-53; SED Ex. 4 at 3522-23; SED Ex. 16. New York continued to accept Core Battery test scores for certification for some teaching titles until September 1999. Tr. at 2318.

92. In 1984 and 1985, ETS conducted an empirical job analysis to collect further validation evidence of the job relevance of the Core Battery tests to the job of public school teachers, regardless of subject matter or grade level. Tr. at

2107, 2197; SED Ex. 29 at E 410. Dr. Michael Rosenfeld testified about the methodology employed in this study. Tr. at 2139; SED Ex. 29. He has a Ph.D. in industrial psychology and measurement and has conducted over 40 job analyses relating to education and teacher certification. Tr. at 2095-96, 2100-01; SED Ex. 841. Dr. Rosenfeld is familiar with the APA/AERA/ NCME standards and was at the time of the study. SED Exs. 841, 29 at E 419.

93. A job analysis is a systematic process for analyzing the knowledge and skills necessary to perform a job. Tr. at 2101, 2107; SED Exs. 29 at E 121-22. The job analyses provide the primary basis for defining the content domain. Although the job analysis techniques are comparable to those used in employment testing, the emphasis for certification is limited appropriately to knowledge and skills necessary to protect the public. Generally, knowledge and skills contained in a core curriculum designed to train people for the job or occupation are relevant. SED Ex. 121 at 64.

94. In conducting the Core Batteryjob analysis, Dr. Rosenfeld and his colleagues identified the core job functions of all teachers, regardless of grade level or subject matter taught; identified the content knowledge and skills deemed important by teachers and administrators for teachers to perform those core functions; and established the knowledge and skills necessary for all teachers upon entry into the profession. SED Ex. 29 at E 410; SED Ex. 800 at 36-37; Tr. at 3057-58. Three school districts were selected to participate in this intensive analysis of the job of a public school teacher: a large, urban Jersey City, New Jersey district; an unaffiliated group of rural and suburban schools in Costa County,

California; and a suburban district in Albany, Georgia. Tr. at 2108. The districts were selected in part because they reflected a wide spectrum of geographical, demographic, socio-economic and educational characteristics. Tr. at 2108, 2145 - 46; SED Ex. 29 at E 411.

95. The researchers determined the knowledge and skills needed by all teachers through three means: a large-scale literature review of the teaching profession; interviewing 100 teachers in three diverse school districts; and conducting an extensive survey of teachers and administrators from all grade levels and teaching titles in those districts. Tr. at 2107-08; SED Ex. 29 at E 411.

96. They conducted an extensive search and review of published information about teachers' duties, responsibilities and requirements, including job descriptions, job analyses and other related articles and books describing what teachers do and what they need to know to perform their jobs. SED Ex. 29 at E 411. Advisory Committees of teachers and teacher educators (including a principal from the Bronx) reviewed the information collected and drafted a survey describing the content knowledge and tasks necessary for all elementary and secondary school teachers. Id.; Tr. at 2110-11.

97. The survey included 83 tasks performed by teachers and 59 knowledge areas, 34 of which were currently assessed on the Core Battery tests and 25 of which were under consideration for inclusion on the Core Battery tests. SED Ex. 29 at E 412-13; Tr. at 2113-23. One thousand eight hundred thirty-nine (1,839) teachers and 89 administrators in the three districts completed the surveys. SED Ex. 29 at E

413. They were asked, "How important is [this knowledge or skill] to YOUR professional functioning as a teacher?" SED Ex. 29 at C-1 (emphasis in original). Respondents were asked whether each knowledge or skill was required at entry level or could be learned on the job. Tr. at 2119; SED Ex. 29 at C-1. The goal was to assess the content knowledge and skills necessary upon entry into the profession; knowledge and skills which could be learned on the job did not need to be covered. Tr. at 2119-20.

98. Dr. Rosenfeld and his colleagues identified six core functions common to the jobs of all teachers. The importance of these functions was determined through a number of statistical techniques and confirmed for all subgroups (elementary and secondary teachers, sex, age, ethnicity, region of the country, years of teaching experience, grade level taught, and current teaching assignment). SED Ex. 29 at E 414-15 and App. J, Table 4; Tr. at 2131, 2142.

99. Through statistical means and professional judgments, the researchers then linked the core functions of the job of a teacher with the knowledge and skills assessed by the Core Battery which had been deemed necessary to perform the core functions effectively. Tr. at 2131-33; SED Ex. 29, VI - 9, Table 19 and VI-15, Table 23;

100. The 1,839 teacher respondents agreed that all 34 content areas on the Core Battery were important, used by them personally in their jobs as teachers and necessary for effective performance as teachers. Tr. at 2131; SED Ex. 29, VI-5 and VI-6, App. K, Table 18. The empirical job analysis provided further validation evidence that the Core Battery

tests assessed content knowledge and skills deemed necessary for public school teachers, regardless of subject matter taught or grade level taught. SED Ex. 29, VII; Tr. at 2139-41.

101. ETS issues Guidelines for the Proper Use of ETS Tests, which provide that ETS tests may not be used to adversely affect the credentialing of a fully licensed teacher. Tr. at 1963-64, 2263. SED Ex. 182 at SED 5305. Requiring temporarily or conditionally certified New York City teachers to take the Core Battery tests in order to become fully certified was consistent with ETS's guidelines for proper test use. Tr. at 1964-65, 1997, 2263.

102. Dr. William Mehrens testified that the validity evidence established that certification decisions made based on candidates' scores on the Core Battery tests were valid. Tr. at 3064-65; SED Ex. 800 at 32-37. Validity evidence established that test content was related to the job of a New York teacher. Tr. at 3058-59, 3043-50; SED Ex. 800 at 34-37. This evidence included the findings of the 1977 task force of New York educators that all teachers should be broadly educated in the liberal arts and sciences, the literature reviews, the work of the NTE Policy council and advisory committees, and the national survey of 3,000 educators, which informed the initial development of the Core Battery tests, the validation and standard setting study conducted exclusively for New York, ETS's 1986 empirical job analysis and the process followed by the Commissioner of Education in setting the passing score. Tr. at 3020-64; SED Exs. 800 at 33-37.

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103. After each test administration, ETS prepared statistical analyses of the Core Battery tests, including reliability data. SED Exs. 191-93, 196-97; Tr. at 1958-62, 1978-79. Dr. Mehrens testified that the reliability statistics indicate that New York's certification judgments based on the Core Battery tests were highly reliable. Tr. at 3053-56.

The LAST

104. In March 1988 Commissioner Sobol's Task Force on Teaching issued its "Blueprint for Learning and Teaching" recommending a statewide test of general liberal arts knowledge for provisional certification for all teachers, including those in New York City, and cautioning against reliance on temporary or emergency credentials, stating, "Anyone in the State using the title 'teacher' should possess a valid license." SED Ex. 35 at SED 1495-97.

105. The Blueprint for Learning and Teaching's recommendations for a test of liberal arts and sciences, as well as the similar recommendations in the 1977 task force report, were the basis for Regents' regulations establishing a test of the liberal arts and sciences for teacher certification. Tr. at 333-37. In May 1989 the Regents determined that individuals seeking provisional certification after September 1, 1993, must complete "a baccalaureate degree with a concentration in one of the liberal arts and sciences and college-level work in English, mathematics, science, social studies, and a language other than English," 8 NYCRR § § 80.15(a)(1)(i) and 80.16(a)(1)(i), and pass a test of the liberal arts and sciences, which became the LAST, and a test of pedagogical knowledge, which became the Assessment

of Teaching Skills - Written (ATS-W). Tr. at 1745; SED Exs. 35, 37, 42, 43. The Regents established additional requirements for permanent certification, to be met within five years, including: two years' teaching experience; a master's degree; passing content specialty tests specific to the individual's teaching title; and an Assessment of Teaching Skills - Performance (ATS-P). 8 NYCRR §§ 80.2(l), 80.2(m), 80.15(a) and 80.16(a). Tr. at 1710-24, 2315. The LAST is a single component of these requirements and tests, collectively called the New York Teacher Certification Examinations ("NYSTCEs"). Tr. at 1752.

106. The Commissioner issued requests for proposals ("RFPs") for all of the New York State Teacher Certification Examinations, requiring that they be closely aligned with the Regents' standards for students and the Regents' academic preparation requirements for teachers. Tr. at 273, 335-36; SED Exs. 45, 47, 51. ETS and National Evaluation Systems ("NES") submitted proposals for the test of liberal arts and sciences. Tr. at 1749-50. SED staff and a team of independent educators reviewed the two proposals. TECAP, which reviewed the proposals, determined that the knowledge and skills to be assessed on the test should have been acquired by the completion of college. Tr. at 3427, 3432.

107. In 1990, SED and NES entered into a contract for the development of the LAST. Pl. Ex. 74. Pursuant to that contract, SED did not pay NES any money to develop the LAST. Tr. at 274; Pl. Ex. 74. Instead, NES was to be paid through the administration of the test. Tr. at 274. SED fashioned this payment scheme because the State legislature would not budget the requisite funds to pay for test

development. Id. NES has designed custom developed educational tests, including teacher certification tests, since 1972. NES-developed tests are used to certify teachers in New York, California, Texas, Illinois, Massachusetts, Arizona and New Mexico, among others. Tr. 699, 2589, 2840; Pl.s Ex. 253 at 84 n. 1.

108. The team which worked on the development of the LAST included Dr. Gerald Freebome, Dr. Charles Mackey and Edith Hunsberger of SED, and NES's Dr. Paula Nassif, Dr. Scott Elliot, Dr. Homer Meade, Steve Weiss and Jeanne Clayton. Scott Elliot, who has an Ed.D. in measurement and assessment in research, was NES's Vice President of Client Services and project manager for the development of the NYSTCEs, including the LAST. Tr. at 384-86, 407, 423. Dr. Elliot is familiar with the joint AERA/APA/NCME standards. Tr. at 1181-82; SED Exs. 121, 122.

109. NES set up two committees of New York educators whose responsibilities were primarily to review all proposed LAST content: the Content Advisory Committee ("CAC") and the Bias Review Committee ("BRC"). Pl. Ex. 112 at N 2031-32; Tr. at 283-84, 780-88, 1129.

110. The CAC consisted of 22 teachers and education college faculty members with specialized expertise in liberal arts and sciences subjects. Tr. at 1130; SED Exs. 485, at N 2795; 357. Its charge was to review proposed LAST materials to ensure that the content was both free from bias and accurate and relevant to the job of a New York public school teacher. Tr. at 1129-30, 1104.

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111. The BRC consisted of 22 New York public school teachers and education college faculty members: ten were Black, six Hispanic, three Asian, one Native American and two had disabilities. Tr. at 1130-31, 2599; SED Exs. 849; 485 at N 2795; 358. Its charge was to review proposed materials for all of the NYSTCEs, including the LAST, to ensure that the tests were free from bias. Pl. Ex. 112 at N 231; Tr. at 284, 1129-31, 1161, 2598-99, 2608. The BRC often broke up into smaller groups to review materials for individual NYSTCEs tests, including the LAST. Tr. at 1157, 786-89.

112. The approved draft framework was then circulated to New York public school teachers and New York education college faculty members for their review and comment in a job analysis survey. SED Exs. 401, 406, 408-10; Tr. at 1138-44. Although the court is suspicious of the actual numbers of surveys reportedly returned to NES, which suspicion is based on the fact that these surveys were destroyed by NES in contravention of the usual practices of test developers and on the complete inability of NES personnel called to testify at trial to remember specifics relating to who was involved in administrating the survey (see discussion regarding lack of documentation infra, PP 143 to 146), the court does find that some sort of job analysis survey was done.

113. The average importance rating (on the 1 to 5 scale) for each of the 21 LAST objectives was 3.83 (a 4 being of "great importance"). Tr. at 1149, 3076; SED Ex. 410 at N 536. The ratings for minority teacher respondents were comparable to that of white respondents. SED Ex. 410 at N 536; Tr. at 3076-77. The objective which received the highest

rating from both teachers and faculty members was objective # 21: the ability to prepare, organize and write an essay. SED Ex. 410 at N 536; Tr. at 1152-53, 3076-78.

114. As a result of the Regents' adoption of new learning standards in 1996, SED contracted with NES to review the NYSTCEs, including the LAST, to ascertain whether they closely tracked the Regents' academic expectations of students. Tr. at 1839-40; SED Exs. 512, 515, 542 at N 3762-63.

115. After the LAST's initial development, a number of national teaching associations issued standards for the credentialing of teachers, including the Interstate New Teacher Assessment and Support Consortium, the National Board for Professional Teaching Standards and the National Council for the Accreditation of Teacher Education. Tr. at 1838-39.

116. The LAST consists of 80 multiple choice questions, 64 of which are scored, and one essay question which assess a candidate's reading comprehension, writing skill, and analytical ability in the areas of mathematics, science and liberal arts. SED Ex. 485; SED Exs. 606-629.[3] Initially there were approximately 350 items in the multiple choice data bank. Tr. at 1165-66, 2678. The essay portion of the test counted for 20 percent of a candidate's final score on the LAST. Tr. at 2766.

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3. SED Exs. 606-629 were sealed by order of this court to preserve the secrecy of the test items.

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117. Test takers are sent a score report indicating performance by subarea level (e.g. math and science, historical and social scientific awareness, the essay question, etc.). Tr. 1881, 2798-99, 2801. Unlike with the Core Battery tests, where test takers could take the test at various locations around the country and elect whether or not to have their score forwarded to SED, because the LAST is a New York-specific test, NES administers the test and retains the scores of all LAST test takers. Upon registration, candidates are asked to provide information regarding their race or ethnicity and college at which they received their teacher preparation. Tr. at 2824.

118. As a group, minority candidates perform least well on the essay and the math and science sections of the test and best on the artistic expression and humanities section of the test. SED Exs. 496-502; Tr. at 2781-83, 2962. Of the three named plaintiffs in this suit, two were unable to pass the LAST because of the written component. SED Exs. 332-36, 342-43, 347. The last named plaintiff performed well on the essay section and passed the LAST accordingly. SED Ex. 349.

119. After each test administration, NES provides statistical analyses to SED about performance on that administration. Tr. at 2777-78.

120. At the end of each year, NES provides SED with annual statewide results. SED Exs. 496-503; Tr. at 2777-78. NES also provides teacher preparation colleges with statistics regarding the performance of their candidates for use in their reporting to the state and federal government. Tr. at 2793-

97, 2800-01. Under both New York and federal law, education programs which have fewer than 80 percent of their graduates passing the teacher certification test risk losing their accreditation or federal funding. Tr. at 2821-22, 2958-65; 8 N.Y.C.R.R. § 52.21(b)(2)(iv)(b); Title 11 of the Higher Education Act Amendments, §§ 207 and 208.

121. As shown below, neither NES nor SED properly identified the specific knowledge, skills and abilities that are critical to job performance and are likely to be present among the pool of people who meet the minimum qualifications of the job of New York public school teacher. Instead, NES presented test development committee members with test frameworks and a set of objectives that were never connected to the particular knowledge, skills, and abilities needed for successful performance of the job of New York public school teacher.

122. The Uniform Guidelines require:

> [A] thorough job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them . . . . The work behaviors selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job.

29 C.F.R. § 1607.14(C)(2).

123. SED contemplated a "[s]equence of events" in which the first major work would be a "task analysis" of the tasks performed by a teacher. From the results of the task analysis, evidence was supposed to be gathered from which the objectives for the test would be drafted. Tr. at 114-15; Pl. Ex. 64 at 7.

124. No one knows whether this actually happened. Sanford Lake, an Assistant in Teacher Certification in SED's Office of Teaching Initiatives, was not sure whether the 5 or 6 content domains of the test were arrived at after a task analysis was performed. Tr. at 161, 168-169. Edith Hunsberger, the Associate in Professional Examinations Development in SED's Office of Teaching Initiatives during the relevant time periods and who was responsible for development of the LAST, acknowledged that the RFP envisioned the drafting of objectives only after a task analysis but testified that "[i]t may or may not have actually followed that order as it turned out." Tr. at 701-702.

125. According to NES, the objectives and frameworks were to be based on materials to be collected from the field, on teacher curricula from colleges and New York public schools, and from interviews to be conducted with Deans from selected colleges. Pl. Ex. 107. There is no documentation describing any of the college materials collected or any information concerning the interviews. Tr. at 400-401; 405-408; 1187-1188.

126. In addition, the retained documents indicate that both the frameworks and the objectives were drafted before the collection of any curriculum materials or the holding of

any interviews. As of March 12, 1991, NES had a draft of the frameworks and objectives, which it presented at a SED meeting. Pl. Ex. 105. The Plan for the Collection of College and University Curriculum Materials was initially approved after that meeting, on March 18, 1991. Pl. Ex. 107. NES has been unable to produce a draft of the objectives prior to April 18, 1991, and there is no way of knowing how the objectives were changed as a result of the March 12th meeting. Tr. at 1852-1853.

127. According to NES officials, New York State public school teacher interviews were to be conducted, and a multi-page "teacher interview protocol" was prepared to be completed by the interviewers and used as the basis for drafting the frameworks. The only information in the record concerning these interviews shows that a total of eight people were interviewed. Pl. Ex. 129. There is no information as to how the interviewees were selected, who they were, or what they said. Pl. Ex. 289 at 125-126. No one knows what happened to the interview forms that were to be completed or whether they still exist. Id. at 126.

128. When people attending the March 12, 1991 meeting reviewed the objectives, they were given comment forms to fill out. Pl. Ex. 289 at 111. No one knows what happened to those completed forms. Pl. Ex. 289 at 112; Tr. at 1856. The Bias Review Committee, however, did recommend that it be reconvened in the fall of 1991 to further review particular objectives. There is no evidence that this follow-up meeting was ever held. Pl. Exs. 120, 122; Tr. at 1866.

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129. A 1991 LAST planning document stated that up to twenty-five people and six alternates would be selected for each of the bias and content review committees. There was a general understanding among SED officials that there should be between ten and twenty-five people on these committees who would review the test objectives and test items. Tr at 283; Pl. Exs. 279 at, 25-26; 290 at 105-106.

130. SED solicited nominations for members of these committees and collected a batch of documents that was "three feet high," and although SED was supposed to keep them, these documents were destroyed. Tr. at 792-93. Ms. Hunsberger acknowledged that there would be no way now. to review who was considered, accepted or rejected. Id.

131. The Bias Review Committee was originally supposed to contain members "experienced in analyzing for test bias." Pl. Ex. 97. That requirement was subsequently dropped; the application/nomination form for committee members contains no reference to experience in analyzing for test-bias. Pl. Ex. 97. Although notes were made and kept of discussions during committee meetings, only "summary notes" on the "consensus" of the committee members were retained. Tr. at 716-717, 720-7211.

132. With respect to the initial twenty-one test objectives and frameworks, only minor changes were made by the committees. Pl. Ex. 114. The frameworks ultimately approved for use were substantially and substantively identical to the initial draft presented by NES in March, 1991. Compare Pl. Ex. 126 with Pl. Ex. 114.

133. Although NES officials stated that content experts were consulted prior to the drafting of the objectives and that revisions in the objectives were made as a result of such input, no person has been identified nor has any of their work been described other than in extremely general terms. Tr. at 1853-1855, 1858. Scott Elliot, a project director and later the Vice President of Client Servies for NES during the relevant time periods, could recall neither the name of any content expert nor any records that would identify them or what they did. Tr. at 394-396. The most information that Stephen Weiss, an editorial director for NES, could remember were the names of two individuals who "commented on the content that we had to find for the various objectives." Tr. at 1858-59. Mr. Weiss testified that changes in the draft objectives were made by "national consultants," but he did not identify who they were or how anyone could determine what changes were actually made. Tr. at 1861-62.

134. In its response to the request for proposal ("RFP") issued by SED, NES stated that it had a standing "Equity Advisory Board" ("EAB") which "generally reviews materials for inclusiveness and potential bias before they are presented to content or bias members" which "has been proven invaluable at detecting potential problems for Blacks, Latinos, women, Native Americans, Asian-Americans, and individuals with handicapping conditions." Pl. Ex. 72 at 3556.

135. Regarding the EAB, no one from NES or SED who worked on the development of the LAST could identify a single person from the EAB with whom he or she met, or who did any work on the LAST, with one exception. Pl. Ex.

287 at 41. Dr. Paula Nassif was identified as the NES employee who worked most closely with the EAB. Id. She was able to name only one current member of the EAB and no members from previous boards. Pl. Ex. 288 at 22-23. She was unable to recall how many members there were on the board. Pl. Ex. 288 at 22. She identified Jeanne Clayton as the NES employee most likely to have "information" about the EAB. Pl. 288 at 23. Jeanne Clayton, a Senior Area Director for NES during the relevant times, testified that the EAB was asked to review materials on the LAST, but was unable to identify anyone on the EAB involved in this work. Pl. Ex. 289 at 66-69.

136. No one from NES or SED could articulate any specific action taken by the EAB beyond a vague suggestion to avoid portray Native Americans as victims in the test items. Tr. at 1859-61, 1068. No other witness could recall any other suggestion made by the EAB. Pl. Ex. 289 at 73.

137. The APA Standards require full documentation of the "procedures used [*69] to develop, review and try out items, and to select items from the item pool." SED Ex. 122, Standard 3.7. In addition, item try-outs "should be documented" and the samples "should be as representative as possible of the population(s) for which the test is intended." Id., Standard 3.8.

138. One of SED's witnesses, Dr. Carolyn Massad, who worked for ETS developing the Core Battery tests, confirmed that test developers follow the APA Standards with regard to document retention when creating test items. She stated that for each item created, ETS would retain a "flimsy", which is

"a piece of paper on which the item is typed. And it may be several sheets of paper attached together with all of the reviews and comments by everyone who has touched that test question and had something to say or do about it." Tr. at 1982. ETS preserved these flimsies. Id.

139. NES represented that teachers, content specialists, and editors would be involved in the development of the items. Pl. Ex. 72 at 3551, 3778. However, neither Ms. Clayton nor any other witness could identify any person involved in drafting the items. Pl. Ex. 289 at 138. Mr. Weiss, who was in charge of item writing, testified that there is no way of determining who wrote items and what they were assigned to write. Tr. at 1869-70. No documentation shows the background, expertise or experience of any item writer.

140. NES also represented in its response to the RFP that it would use a form for each draft test item containing information which required the item writer to record the author, date, objective, topic, item number and source, and included a large space for the drafting of each item. Pl. Ex. 72 at 3782. However, no such forms were produced. Mr. Weiss did not recall whether such a form was actually used in connection with the creation of the LAST. Pl. Ex. 290 at 92. Consequently, there is no way of determining what changes were made to any of the draft items. Tr. at 1870-71. The items for the LAST were not necessarily taken from specific source material but could have been drafted by an item writer based upon his or her own knowledge if he or she had expertise in that field. Pl. Ex. 290 at 120-21. There is no way of knowing what source material was used to create any test item. Id. at 125-126. Mr. Weiss testified that there

were "item tryouts," and that changes were made to the items as a result, but there is no documentation of this activity and no way of determining what was done in this regard. Tr. at 1871

141. When the new student learning standards were introduced in New York in the late 1990s, NES and SED purportedly conducted an investigation of the standards as they related to specific test items. However, there is no way of determining what was done, whether the items were changed or how any new items reflected the new learning standards. Tr. at 1883-1884.

142. NES represented in its response to the RFP that "[t]o insure a continuing stream of observations from the minority community, an annual meeting of the Minority Review Committee will be organized." Pl. Ex. 72 at 3557 (emphasis in original). There is no evidence that this occurred. The disparity in passing rates on the LAST has increased over time. Tr. at 2693, 2854-59. No differential item analysis was undertaken. Tr. at 2674. The failure to conduct a differential item analysis violates APA Standard 7.3: "[W]hen credible research reports that differential item functioning exists... test developers should conduct appropriate studies when feasible." SED Ex. 122.

Pervasive Lack of Documentation

143. The original SED/NES contract contained a provision that required the retention of documents for a period of six years. The renewal contract, executed in 1995, contained the same provision. Pl. Ex. 74, App. A P 10. Under

these provisions all test development documents should have been retained and been available for review.

144. Despite the representations in NES's documents, neither it nor defendants could identify: any person involved in collecting curricula, or any documents that would identify them, Tr. at 396:20-397; any educator interviewed by NES, Tr. at 400-401; any contacts with teachers in the field and field observations, Tr. at 405-408; any person involved in the creation and drafting of the frameworks, Tr. at 399, 437-38, 408-409; any documents which reflect the existence of the collected material or whether it is possible to determine what materials were used and how they were used, Tr. at 1843-48; whether materials were collected or interviews completed before the drafting of the objectives presented at the March 12, 1991 meeting, Tr. at 1851-53; the criteria that were used to develop the test's frameworks and content, Pl. Ex. 289 at 113-16; or any person who was involved in drafting those frameworks, Pl. Ex. 289 at 101, 104-05.

145. NES and SED retained insufficient documentary evidence to enable a person to reconstruct the process of developing the objectives. According to Mr. Weiss, this is the "wrong idea of the purpose of the process . . . . Our purpose was not to perform a scientific experiment in a way that made sure it could be replicated." Tr. at 1855. Dr. Mehrens wishes that NES kept certain documents that they did not keep. Tr. at 3175. Specifically, Dr. Mehrens would have liked for NES to have kept sufficient documentation and data to allow someone to recreate the company's validation results. Tr. at 3175-3176. He does not know why NES did not keep the test development documents. Tr. at

3193. Dr. Massad, a test developer at ETS, testified that "it is my responsibility as a professional" to document the test development process so that it could be reconstructed by a third party at some time in the future. Tr. at 1971.

146. This law suit is not the first time NES's failure to retain documents has been criticized. The National Research Council (NRC), the research wing of the National Academy of Sciences (a federal agency comprised of the nation's premier scientists, Tr. at 1339-40) compiled a report on teacher certification exams like the ones at issue in this case; this report, entitled "Testing Teacher Candidates," was received into evidence. Tr. at 1322; Pl. Ex. 253. In the report, the NRC stated that it could not comment on the tests developed by NES, for the following reason:

> Efforts to obtain sufficient technical information for the committee to evaluate the tests similar to what the committee received from ETS were unsuccessful for NES tests. As a result, . . .the committee can make no statements about their soundness or technical quality.
>
> The committee's inability to comment on NES-developed tests is significant. First, NES-developed tests are administered to very large numbers of teacher candidates [NY, MA, AZ, CA, IL, TX, CO and OR all use NES- developed tests]. Second, the disclosure guidelines in the joint *Standards for Education and Psychological Testing* specify that "test documents (e.g. test materials, technical manuals, users guides, and

> supplemental materials) should be made available to prospective test users and other qualified persons at the time a test is published or released for use."

Pl. Ex. 253 at 84; Tr. at 1323. When the NRC requested the relevant materials from NES, NES responded that those materials were under the control of the client states and that requests must be made of those states. Pl. Ex. 253 at 84-85. When the NRC requested the relevant materials from the client states, they were told that their contracts with NES prohibited providing those materials to outsiders such as the NRC. Id. at 85.

The LAST Cut Score

147. According to plaintiffs' expert, Dr. Landy, licensing and certification tests should be designed to prevent a specific harm. Tr. at 1310, 1360-1361. Dr. Mehrens agrees. Tr. at 3146.

148. Dr. Mehrens is, however, unaware of any definition of harm specified or used by the State or NES in their development of the LAST. Tr. at 3148. Dr. Mehrens does not know whether the individuals who developed the LAST had an understanding of the concept of harm. Tr. at 3149. Committee members were never told that "harm prevention" was the objective of the LAST, nor were they informed of the type of harm or harms that the test was intended to reach. Tr. at 3149-3150. Committee members who rated the objectives for the LAST were never asked to look at or determine whether a test-taker's lack of knowledge about

particular objectives or test items would cause harm. Tr. at 3149-3150. No committee members testified that the concept of harm was part of their analysis in their review of the frameworks, objectives, or items.

149. The passing score for the test recommended by the Content Advisory Committee after using the Modified Angoff method, was 48. Pl. Exs. 156; 163; 165; Tr. at 2839-2841. The Bias Review Committee performed the same exercise and recommended a passing score of 38. These recommendations were then taken to the State Commissioner who approved a passing score of 38. Tr. at 2841-2842. No one from SED or NES or any of the Committees ever performed an Angoff analysis on any of the other 270 items in the 350 item bank. Tr. at 2865-2867.

150. The Content Advisory Committee recommended increasing the passing score to 44. This was. presented to the Commissioner, Tr. at 2659-66, 3308-15, who decided to adopt Jeanine Grinage's recommendation to increase the passing score incrementally from 38 multiple choice questions correct to 44 over three years, from 1998 to 2000. Tr. at 3308-15, 607-08, 612-13, 2666-67; SED Exs. 588-89, 591-93, 782, 810. The Commissioner subsequently decided to make the final increase to 43 rather than 44. Id. At the time the passing score committee was determining whether the cutoff score should be raised to 44, it was given performance statistics showing that, if the cutoff score were to be set at 44, only 29% of African American test-takers and only 26% of Latino test-takers would pass, as opposed to 78% of White test-takers. Pl. Exs. 212, 214, 215, 217, 218.

151. Neither Ms. Grinage nor Commissioner Mills knew then, and they do not know today, of any study correlating teachers' performance on the LAST with the performance of students in the classroom. Tr. at 600, 3338. Although Ms. Grinage thought that such a study would be a "good idea," Tr. at 600, SED never performed such a study because "we had no money." Id.; Pl. Ex. 263. Commissioner Mills asked that a study be prepared, but that has not yet happened. Tr. at 3338-39.

152. According to Ms. Torres, who sat on one of the committees that recommended raising the cut score on the LAST, Tr. at 2913, the purpose of the LAST cut score is not to distinguish between minimally competent and incompetent teachers. Tr. at 2916. Dr. Mehrens and Dr. Landy agree that in fact this is precisely the purpose of a cutoff score on a licensing test. Tr. at 3215-3216; 1361.

153. The court finds that there is insufficient documentation upon which to make a determination regarding the validity of the LAST for the uses to which it was put by defendants. Tr. at 1490.

PART III: PLAINTIFFS' PROPOSED ALTERNATIVES TO THE LAST

154. As purported alternatives to the LAST, plaintiffs advanced: (1) the use of "portfolio" assessments of teachers such as used in Connecticut, Tr. at 3509-42; and (2) the use of a "compensatory" model, in which a candidate who is unable to pass the LAST would be allowed to compensate for that inability with some other quality, such as a higher

score on one of the other licensing tests or years of experience. Tr. at 3532-35.

155. Dr. Landy asserted that New York could employ "portfolio assessments" such as the system he claims is used by Connecticut, to replace the LAST. Tr. at 3514-15, 3532, 3542-43. He asserted that this "Connecticut scheme" for making certification decisions is more effective than the New York system Tr. at 3521; that Connecticut's system would be related to the job of a New York teacher, Tr. at 3522; and that the use of the Connecticut scheme would have less of an adverse impact than the LAST. Tr. at 3526-32, 3542.

156. In fact, Connecticut does not use a portfolio review scheme instead of teacher testing; rather, Connecticut uses portfolios to assess the progress of its beginning teachers who have already been certified by passing both the Praxis I and Praxis II tests, and who are in their second year of teaching. Pl. Ex. 253 at 51, 153; Pl. Ex. 304 and 305 at 3. Dr. Landy admitted that Connecticut teachers have already passed two tests of academic knowledge and skills before undertaking a portfolio assessment in the area of their teaching specialty and that Connecticut does not use a portfolio model *instead of* tests, but uses it *in addition to* tests. Tr. at 3543-45. Dr. Landy testified that Praxis I may be waived as a requirement to enter education school if an applicant achieves a sufficient SAT or ACT score but that passing Praxis II is always a precondition to entry into teaching. Tr. at 3544.

157. Dr. Landy admitted that the statistical analyses that he relied upon to claim that the Connecticut portfolio review

system has less adverse impact than tests was based on a population which has already passed these tests. Tr. at 3544. These analyses are not probative of a non-test-based alternative. The statistics set forth in the NRC report regarding the performance of minority candidates on the Praxis I and II tests suggests that the impact would be significantly greater. Pl. Ex. 253 at 108-09.

158. Dr. Landy suggested that a "compensatory model" would be an alternative to provide additional time to take the tests, under terms similar to those set forth in Commissioner Mills letter to Chancellor Crew. Tr. at 3535; Pl. Ex. 19. Dr. Landy did not explain how giving people more time to pass the LAST would be an "alternative" to having to take it eventually. This alternative does not articulate a feasible, equally effective and less discriminatory way of assessing the same knowledge and skills as are measured by the LAST.

CONCLUSIONS OF LAW

159. As explained supra, under Title VII disparate impact law, if plaintiffs establish a prima facie case of disparate impact, the burden shifts to defendants to show that the challenged practice is job related "and consistent with business necessity". *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971); *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 986, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988); *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147, 161 (2nd Cir. 2001). Where employment tests are challenged, the question is whether the test bears "a manifest relationship to the

employment in question." *Griggs*, 401 U.S. at 432 (citation and internal quotes omitted); *Watson*, 487 U.S. at 997-98.

160. To establish a prima facie showing in a disparate impact case, plaintiffs must

> establish, by a preponderance of the evidence that the employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(k)(1)(A)(i). To make this showing, a plaintiff must (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal connection between the two.

Robinson, 267 F.3d at 147. In this case, there is no dispute as to the first or third elements: the challenged policy is the use of the Core Battery and/or LAST, and plaintiffs were demoted because they were unable to pass them. The only question is whether plaintiffs demonstrated a disparity. The court finds that they did; accordingly, the court holds that plaintiffs have established their prima facie case.

161. The burden having shifted to defendants, the court must decide whether they have demonstrated that the Core Battery and the LAST are job related. Plaintiffs urge the court to hold defendants to the disparate impact standard enunciated by the Second Circuit in the 1970s and 1980s in relation to challenges to standardized testing — namely, formal validity. See *Guardians Ass'n of New York City Police Dep't, Inc. v. Civil Serv. Comm'n*, 630 F.2d 79, 95-105 (2d

Cir. 1980), cert. denied, 452 U.S. 940, 101 S. Ct. 3083, 69 L. Ed. 2d 954 (1981); *Guardians Ass'n of New York City Police Dep't, Inc. v. Civil Serv. Comm'n*, 633 F.2d 232 (2d Cir. 1980). Under this standard, while defendants would prevail with respect to the Core Battery, plaintiffs would emerge triumphant with respect to the LAST.

162. Unhappily for plaintiffs, however, the Supreme Court lowered the bar for defendants in disparate impact suits. In Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988), the Court explained:

> Our cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal "validation studies" showing that particular criteria predict actual on-the-job performance. In [*New York City Transit Authority v. Beazer*, 440 U.S. 568, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979)], for example, the Court considered it obvious that legitimate employment goals of safety and efficiency permitted the exclusion of methadone users from employment with the New York City Transit Authority; the Court indicated that the manifest relationship test was satisfied even with respect to non-safety-sensitive jobs because those legitimate goals were significantly served by the exclusionary rule at issue in that case even though the rule was not required by those goals.

Id. at 998 (citations and internal quotation marks omitted). In the instant case, defendants have shown that the LAST is manifestly related to the legitimate educational goals enunciated by SED.

163. The court concludes that the LAST is job-related, despite defendants' failure to demonstrate its formal validity, because of the coincidence of three factors: (1) the importance given to the ability to write an essay by those education professionals surveyed by NES (see supra, P 113); (2) the weight of the essay writing portion of the test (see supra, P 116); and (3) the fact that the majority of plaintiffs would have passed the LAST but for the essay writing portion see supra, P 118). The education professionals surveyed by NES stated that of all the skills required of teachers, the ability to write a coherent essay was most important. For this reason, the essay portion of the test was given more weight than any other, a full twenty percent. Plaintiffs, however, were brought low by this section; the evidence introduced at trial demonstrated that the majority of them performed worse on the essay portion than on any other section. The named plaintiffs who failed the LAST did so because of their poor performance on the essay portion; the named plaintiff who passed did well on that section.

164. It should go without saying that New York City teachers should be able to communicate effectively in both spoken and written English. Teachers who are unable to write a coherent essay without a host of spelling and grammar errors may pass on that deficiency to their students, both in commenting upon and grading the work they turn in. Defendants' decision to exclude those who are not in

command of written English is in keeping with the legitimate educational goal of teaching students to write and speak with fluency. The court concludes that defendants have met their burden and shown that the LAST bears a manifest relationship to teaching.

165. Plaintiffs have failed to offer a cost effective, practical alternative to the tests used by defendants in certifying teachers. See *Watson*, 487 U.S. at 998 ("Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective in serving the employer's legitimate business goals"). Although this court was impressed by the portfolio method of certification used by the state of Connecticut, the evidence demonstrated that it was used in addition to, not instead of, testing. Accordingly, the evidence did not clearly demonstrate that instituting Connecticut's certification process would have less of a disparate impact. See Robinson, 267 F.3d at 161. The evidence adduced regarding a compensatory model alternative was simply too thin. See *New York City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 72 (2d Cir. 2000).

Conclusion

In light of the foregoing, the court finds for defendants. Accordingly, it need not address the Board's crossclaims against SED.

Appendix B

SO ORDERED.

Dated: September 4, 2003

New York, New York

CONSTANCE BAKER MOTLEY

United State District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 30, 2007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:

Docket Number:	03-9062-cv
Short Title:	Gulino v. Board of Education
DC Docket Number:	96-cv-8414
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Constance Motle

AMENDED ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of May two thousand six.

Appendix C

GULINO v BOARD OF EDUCATION

03-9062-cv

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Appellee the Board of Education of the New York City School District of the City of New York. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Thomas Asreen, Acting Clerk

By: s/ [illegible]
Motion Staff Attorney

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No. 07-270

FILED
OCT 29 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

BOARD OF EDUCATION OF THE NEW YORK CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,
Petitioner,

v.

ELSA GULINO, MAYLING RALPH AND PETER WILDS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When Congress enacted Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, it expressly provided that Section 2000h-4 of Title VII trumps inconsistent state laws. New York State imposed a testing requirement for individuals seeking employment as teachers in public--but not private--schools. The Second Circuit found that the state-mandated certification test has an actionable disparate impact on African-American and Latino test takers, was not properly validated under the law, and therefore violates Title VII. May New York City be relieved of liability for using the results of that test in violation of Title VII to make employment decisions by claiming that as a state requirement, it is somehow immune from Title VII's strictures?

PARTIES TO THE PROCEEDING

Elsa Gulino, Mayling Ralph, and Peter Wilds appear in this matter on behalf of themselves and a class of all other similarly situated African-American and Latino New York City Public School Teachers, and are the Respondents before this Court. The Board of Education of the New York City School District of the City of New York is the Petitioner before this Court.[1] The New York State Education Department, a defendant in all proceedings and the trial below, was dismissed from the case by the Second Circuit Court of Appeals.

[1] The case before the district court was entitled *Gulino, et al. v. Board of Educ.*, 96 Civ. 8414 (S.D.N.Y.). During the trial, the New York City Board of Education was renamed the New York City Department of Education. For ease of reference the original nomenclature has been used in this brief.

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N.Y. Exec. Law § 296 15

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit issued its decision finding for Plaintiffs Elsa Gulino, Peter Wilds, and Mayling Ralph on behalf of themselves and the Plaintiff class (collectively "Respondents") on August 17, 2006. The decision is reported at *Gulino v. Bd. of Educ.*, 460 F.3d 361 (2d Cir. 2006), 2006 U.S. App. LEXIS 21297, and can be found in Petitioner's Appendix at page 1a. The Second Circuit denied Petitioner's petition for rehearing en banc on May 30, 2007. That decision can be found in Petitioner's Appendix at page 123a.

The United States District Court for the Southern District of New York (Motley, J.), entered judgment for Petitioner New York City Board of Education on September 18, 2003. That opinion is reported at 2003 U.S. Dist. LEXIS 27325, and can be found in Petitioner's Appendix at page 57a. The district court had jurisdiction over this action, a disparate racial impact challenge, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), and 28 U.S.C. § 1331. Appellate jurisdiction arose under 28 U.S.C. § 1291. On October 14, 2003, Respondents timely filed a notice of appeal from the lower court judgment.

JURISDICTION

This Court has jurisdiction to review the judgment of the Second Circuit Court of Appeals under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

The Board of Education for the School District of the City of New York (the "City"), filed a Petition for Certiorari seeking review of a unanimous decision of a panel of the Second Circuit Court of Appeals. The New York State Education Department (the "State"), was dismissed from the case by the Second Circuit and did not petition for review before this Court.

A. Statement of Facts

In 1996, Respondents filed their complaint on behalf of a class of African-American and Latino public school teachers employed by the City, alleging discrimination in employment on the basis of race and ethnicity in violation of Title VII and New York State and City anti-discrimination laws.[2]

Respondents are experienced teachers who have completed all of the rigorous requirements for their positions other than passing one of the two sequentially offered liberal-arts-based "certification" tests. Passage of either of these "certification" tests—either the first test, the National Teachers' Examination Core Battery (the "NTE") or its replacement, the Liberal Arts & Sciences Test (the "LAST")—has been a requirement for eligibility to teach in New York City's public schools since September 2, 1984.[3] This requirement was not enforced by the City, however, until late 1994.[4]

For many years, the City had the authority to set its own credentialing requirements for its public school teachers, with the sole limitation that City teachers had to meet minimum State qualifications.[5] In accordance with State and City law and regulations, Respondents were required to: (1) possess a bachelor's degree from a four-year college accredited by the State; (2) possess a masters degree from a similarly accredited institution; (3) have earned at least thirty credits in child-abuse prevention at a State-approved school; (4) have earned a passing score on the State-

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[2] On July 13, 2001, the court certified the following class:

> All African-American and Latino individuals employed as New York City public school teachers by Defendants, on or after June 29, 1995, who failed to achieve a qualifying score on either the NTE or the LAST, and as a result either lost or were denied a permanent teaching appointment.

Gulino v. Bd. of Educ., Aug. 2, 2001 Order.

[3] N.Y. Educ. Law § 2590-j(2); City Chancellor's Regulation C-332.

[4] *Gulino v. Bd. of Educ.* trial transcript "Tr." 872:8-873:6; 881:2-884:13.

[5] *Gulino III*, 460 F.3d at 366-67.

mandated Assessment of Teaching Skills – Written, or have a received a special exemption from that requirement; (5) have earned a passing score on the State-mandated content specialty tests for the subjects they teach; and (6) have satisfactorily completed a three-year probationary period of teaching in the City's public schools.[6]

In 1984, when the State began requiring all public school teachers to pass the NTE, with the exception of those teachers working in New York City and Buffalo, passage of the NTE nevertheless also became a requirement for City teachers because State Education law required the City to adopt credentialing regulations that were "substantially equivalent or not less than those required by the state."[7] Consequently, in 1984, the City Chancellor adopted a regulation requiring that public school teachers applying for a City license pass the NTE to satisfy the substantial equivalence requirement.[8] However, one year later, on September 11, 1985, the City requested that the State Education Department permit it to defer implementation of the new requirement, so that City public school teachers would not have to obtain a passing score on the NTE *prior* to receiving a City license, but instead could fulfill the test requirement by no later than the end of a five-year period following initial City licensure.[9] The State approved the City's request.[10] In October 1985, City Chancellor's Regulations were adopted formalizing the City's approved plan permitting teachers to acquire a City credential and establishing a five-year period for passage of the NTE.[11] Both the City and the State understood that pursuant to the City's approved plan, if a teacher lost her City credential, the City would lower her status to that of a substitute teacher, substantially reduce her salary, and reduce or eliminate other benefits provided to permanent teachers under their collective bargaining agreement with

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[6] Tr. 834:4-835:2; 884:17-887:8.

[7] *Gulino III*, 460 F.3d at 366-67; *see* N.Y. Educ. Law § 2590-j (2).

[8] City Chancellor's Regulation C-332.

[9] This agreement was confirmed in an exchange of letters between the Board of Education and the State in 1985. Pl. Exs. 30, 31, 32, 33

[10] *Id.*

[11] City Chancellor's Regulation C-238.

the City.

In 1990, the New York State Legislature amended the Education Law to abolish the City's Board of Examiners (the City's own testing agency) and eliminate the requirement that City teacher applicants take two tests, one developed and administered by the City and one approved by the State.[12] The Act, which became effective in 1991, also mandated that City teachers have State Education Department certification as a predicate for a New York City Public School System teaching credential.[13] New applicants for City credentials were to obtain provisional State certification in order to be eligible for a teaching position in the City's public schools.[14] Accordingly, the City Chancellor enacted a new regulation requiring City teaching applicants to fulfill the State's testing requirement by the time they submitted their application for a City credential, rather than within five years of the date of issuance of their City credential.[15] This new regulation had the effect of requiring City teaching applicants to pass the State's certification test as part of the application process for a City credential. Concomitant with these changes, the State began phasing in the LAST as a replacement for the NTE. The State's new requirements included the LAST as part of a series of five tests, designed to be taken at various junctures in a teacher's career.

Throughout the changes over the years, the City retained control over the employment effects of the testing program either by granting extensions of time for teachers to comply with the new state testing requirement, or by using a "grandfather" clause that permitted public schools to continue employing teachers who had applied for or received their City credential prior to January 1, 1991, but

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[12] *See* 1990 N.Y. Laws, c. 650 (the "1990 Act").

[13] Thus, for the period from 1984 through 1991, the State Education law requirement of passage of one of the State certification examinations was not legally binding on the City; because of the City's independent licensing authority, its teachers were exempt from the specific State certification requirements.

[14] Educ. Law § 2590-j (as amended).

[15] City Chancellor's Regulation C-265.3.

had not yet met the testing requirement. The City, exercising its discretion under this provision, retained many hundreds of teachers as full-time classroom teachers after it demoted them to substitute status and cut their salaries and benefits when they did not timely pass the State's certification test.[16]

Accordingly, even though they never achieved a passing score on the LAST, many teachers continued teaching full-time in the City's schools for many years, albeit at salaries well below that of their certified colleagues. And those teachers who ultimately achieved a passing score, remained at a salary step level far below that of their colleagues with equivalent seniority in the City school system. In practice then, the City and State used the LAST not to determine whether teachers should be allowed to teach, but rather to determine their level of compensation and benefits. For example, many teachers who did not satisfy the certification testing requirement continued to teach in the City schools, but were demoted to substitute status; suffered significant reductions in compensation; were placed in a different pension system which resulted in reduced benefits; and had their seniority and retention rights revoked.[17]

Moreover, the Tests are not—and were never intended to be—licensing tests. Gerald Nolan, the former State Deputy Commissioner for Higher and Professional Education, that was responsible for the licensing programs for the professions in New York State, testified that although there are thirty-eight licensed professions in New York—teaching is not one of them:

> There are 38 such [licensed] professions, including, for example, law, medicine, architecture, and real estate. A "profession" is defined by the legislature

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[16] *Gulino I*, 236 F. Supp. 2d at 334.

[17] Tr. 199:17 - 200:8; 881:2-883:1; 1222:7-10; 61:18-20; 628:21-629:3; Pl. Ex. 270; BOE Ex. L; Tr. 207:25-208:12; 215:23-216:9; 1020:16-22; 1023:14-15; Pl. Ex. 3; Tr. 59:23-61:17; Pl. Ex. 1; Tr. 628:17-20; Pl. Ex. 4.

> as an occupation which requires the passage of a licensing test and obtaining a license in order to "empower[ ] the individual so licensed . . . [to] practice the profession." Teaching is not a "profession" and does not require passage of a license test.[18]

New York's legislature never intended teaching to be a licensed profession. Consequently, in New York, if teachers want to teach in the public schools, they must obtain certifications, not licenses.[19]

When teachers are permitted to continue teaching in the City's public schools for years despite their failure to achieve a passing score on the LAST portion of the State's certification examination process, and teachers who wish to teach in the New York private school system need not take the State's certification examinations, there can be no conclusion other than that teaching is not a licensed profession in New York and the LAST is not a licensing test.

B. District Court's Opinion

Following discovery, all parties moved for full or partial summary judgment. In denying the City's and the State's respective motions for summary judgment, the district court found that both agencies were "employers",[20] and that New York's teacher certification tests, the NTE and the LAST, are covered by Title VII.[21]

After a lengthy bench trial, the district court issued its factual findings and legal conclusions on September 4,

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[18] Pl. Ex. 35, at 13, 17-19. The City's statement in its Petition that there is no dispute that the LAST is a licensing test is simply wrong and for support cites only to the testimony of the State's testing expert Dr. William Mehrens.

[19] Pl. Ex. 35, at 27-28.

[20] *Gulino v. Bd. of Educ.*, 236 F. Supp. 2d 314, 328-35 (S.D.N.Y. 2002) ("*Gulino I*"), *modified*, 2002 U.S. Dist. LEXIS 24965, 2002 WL 31887733 (S.D.N.Y. Dec. 23, 2002).

[21] *Gulino I*, 236 F. Supp. 2d at 328-35.

2003. On September 18, 2003, the court entered its final judgment and order, concluding that the tests had a significant adverse impact on African American and Latino teachers working in the City's schools.[22] The significance of the disparities in passing rates between teachers of color and white teachers ranges (during the evaluated years) from nineteen to seventy-five standard deviations with respect to the LAST, depending on which populations were compared.[23]

The court devoted over fifty paragraphs of findings to the issues of validity, job relatedness, and business necessity of the LAST,[24] and concluded that the City and State were unable to demonstrate that the LAST had been validated under the standards articulated by the Second Circuit in *Guardians Ass'n of N. Y. City Police Dep't, Inc. v. Civil Servants Comm'n*, 630 F.2d 79 (2d Cir. 1980), the United States Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures (the "Guidelines"), 29 C.F.R. §§ 1607 *et seq.*, and the professional standards for test development issued by the American Psychological Association (the "APA Standards").[25] The court also found that if the *Guardians* decision applied to this case, the teachers "would emerge triumphant" with respect to their claims regarding the LAST.[26]

Failing to apply the standards delineated in the 1991 Amendments to Title VII,[27] however, the district court relied on an erroneous standard and entered judgment for Defendants solely because twenty percent of the LAST contained an essay section, and the court intuitively believed that it was important for teachers to be able to

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[22] *Gulino v. Bd. of Educ.*, 96 Civ. 8414, 2003 U.S. Dist. LEXIS 27325, slip op. at ¶¶ 45-65 (S.D.N.Y. Sept. 4, 2003) ("*Gulino II*").
[23] *Id.*
[24] *Id.* ¶¶ 104-153.
[25] *Id.*
[26] *Id.* ¶ 161.
[27] *Id.* ¶ 162.

write an essay.[28] No other reason was given for the court's decision in favor of Defendants with respect to the LAST.

C. Circuit Court's Decision

The Court of Appeals reversed the district court, holding that, in addition to the use of an incorrect legal standard, the court also made a number of factual errors, necessitating a remand for further proceedings.[29] Specifically, the Second Circuit found that the district court erroneously concluded that all Plaintiffs in the class would have passed the LAST had they not failed the essay portion of the test. The district court failed to take into account the evidence showing that there were Plaintiffs who had passed the essay portion and yet failed to achieve a passing grade on the test, as well as the fact that the LAST's compensatory scoring scheme meant that no single test section could be isolated as the sole factor causing a specific group to fail the test.[30]

The Second Circuit also noted that the decisional authority made clear that the City was an "employer" of Respondent teachers for the purposes of Title VII because it was the agency that "hired, promoted, demoted and fired teachers in New York City." The Court of Appeals did, however, dismiss the State, finding that it should not have been considered a joint-employer of Respondents.

REASONS FOR DENYING THE WRIT

I. BECAUSE THE RECORD IN THIS CASE IS INCOMPLETE AND UNCLEAR, IT IS NOT PROPERLY BEFORE THE COURT FOR REVIEW

The Second Circuit vacated the judgment of the district court and remanded the case for further proceedings

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[28] *Id.* ¶¶ 163-64.

[29] *Gulino v. Bd. of Educ.*, 460 F.3d 361, 382-88 (2d Cir. 2006) ("*Gulino III*").

[30] *Gulino III*, 460 F.3d at 387-88.

consistent with its opinion. Because the district court's erroneous factual conclusions formed the foundation of its Title VII liability ruling, the Second Circuit's opinion requires that the proceedings on remand involve both a review of these factual errors and the application of the proper legal standard to the new factual findings. Given the incomplete state of the record and the lack of finality in the judgment below, this matter is not properly before this Court for review. This Court has long stressed that the lack of finality "alone" provides "sufficient ground for the denial of the application [for a writ of certiorari]." *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). If the City were to have its way, the Court would be in the position of reviewing a question on which the writ were granted—*i.e.*, whether the City should be liable under Title VII for implementing a State law requirement with a significant disparate racial impact—despite the fact that the issue had never been the subject of an actual court judgment. *See Cal. v. Rooney*, 483 U.S. 307 (1987) (writ dismissed as improvidently granted).

Moreover, as the Second Circuit observed, the record before that court was unclear because the City had not put together a complete record of the proceedings below for review on appeal. The Second Circuit made plain that it was unable to determine whether the City's argument below—which is the same argument advanced to the Court—had been revised for the first time on appeal.

> We would be able to say with certainty whether [the City] had (or had not) raised this below if [the City] had included in the record on appeal the memorandum in support of its summary judgment motion. Regrettably, the several thousand page appendix contains no trace of the arguments made by [the City] below. This omission arguably violates federal appellate and local court rules, certainly wastes judicial resources, and is ill-advised in a record-intensive case raising numerous important issues on appeal.[31]

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[31] *Gulino III*, at 380 (citations omitted)

The City's failure to provide the courts with a complete record militates against certiorari at this juncture.

In the absence of a novel and important question of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, judicial efficiency would be best served by deferring review until rendition of the final judgment should the matter be deemed to present a basis for granted certiorari.[32]

II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON ANY ISSUE IN THE CASE

This Petition is Petitioner's third effort to convince a court that it cannot be held liable as an employer under Title VII for the disparate impact of the LAST because it was merely following the dictates of state law, Petition ("Pet.") at 12, or because the Test is a state-mandated *licensing* examination unrelated to the City's exercise of its employment authority. *id.* These arguments, however, are no more compelling now than they were in the proceedings below. The Second Circuit's conclusions regarding Title VII's coverage of the circumstances at issue fall squarely within the parameters of this Court's decisional authority and are not in conflict with the findings of any other circuit.

A. The Second Circuit's Holding That Title VII Trumps Inconsistent State Law Is Consistent With That Of Every Court That Has Considered The Issue

As both the district court and the Second Circuit concluded, there is no room for doubt as to the City's status as Respondents' Title VII employer. Accordingly, the City does not now contest—nor did it contest below[33]—that it is

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[32] *See, e.g., Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964) (Court first denied certiorari after court of appeals set aside jury verdict and permitted a new trial only after a showing of additional evidence, and then granted certiorari after the lower courts subsequently declared the proffered evidence insufficient to warrant a new trial).

[33] *Gulino I*, 236 F. Supp. 2d at 334 & n.25.

Respondents' employer, rather it claims that it cannot be held responsible for its use of the Test or the Test's disparate impact because it was following the mandates of state law. Pet. at 11-12. This argument fails on both the law and the facts.

The City's argument that because the challenged Test is or was a State requirement, it cannot be liable for any harm flowing from its use is wholly undermined by the language of Title VII and settled decisional authority. Section 2000h-4 of Title VII states:

> Nothing contained in any title of this act shall be construed as . . . invalidating any provision of State law unless such provision is inconsistent with any of the purposes of the Act, or any provision thereof.

The Court has interpreted this provision as meaning that the strictures of Title VII trump conflicting state laws.[34] The statute simply does not shield the City from liability by virtue of the fact that the test it used was created by the State or even, ultimately by 1994, mandated to be used by the State. The principle is well established in preemption theory that where compliance with both the state and federal laws is impossible, or where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" conflict preemption applies.[35]

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[34] See, e.g., *Cal. Fed. Sav's. and Loan Ass'n v. Guerra*, 479 U.S. 272, 282 (1987) (Sections 2000e-7 and 2000h-4 of Title VII establish Congress's intent that state laws in conflict with Title VII regulation of employment practices be preempted).

[35] *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). *See, e.g., Guardians Ass'n*, 630 F.2d at 104-105 ("Title VII explicitly relieves employers from any duty to observe a state hiring provision 'which purports to require or permit' any discriminatory employment practice"); *Kirkland v. N. Y. State Dep't of Correc. Serv.*, 552 F. Supp. 667, 675-76 (S.D.N.Y. 1982) ("[i]t is clear that state law must yield to federal law in a Title VII case"); *Hill v. Berkman*, 635 F. Supp. 1228, 1239 (E.D.N.Y. 1986) ("It is clear that state legislation in conflict with Title VII is void under the Supremacy Clause"), *overruled on other grounds, Roper v. Dep't of the*

B. The Second Circuit's Conclusion That As a Title VII Employer, The City Is Responsible For Its Use Of Discriminatory Tests Is

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Navy, 832 F.2d 247 (2d Cir. 1987); *U. S. v. Buffalo*, 457 F. Supp. 612, 630-31 n.20 (W.D.N.Y. 1978) (defense by City of Buffalo that State law mandated sex discrimination was not permitted under Title VII); *Williams v. Gen. Food Corp.*, 492 F.2d 399, 404 (7th Cir. 1974) ("It would have been incongruous for Congress to have intended a defense resulting in the perpetuation of discriminatory employment practices (even if based on state law) in a federal law designed to achieve equality of opportunity."). *Gulino III*, 460 F.3d at 380 (quoting Guardians IV, 630 F.2d at 105 (quoting 42 U.S.C. § 2000e-7)); *accord Guardians Ass'n of the N. Y. City Police Dep't, Inc. v. Civil Servants Comm'n of the City of N.Y.*, 630 F.2d 79, 105 (2d Cir. 1980), cert. denied, (452 U.S. 940 (1981) (state law requirement of rank order selection from scores on police hiring tests found to have disparate impact); *Kober v. Westinghouse Elec. Corp.*, 480 F.2d 240, 246 (3d Cir. 1973) (state law requiring denial of certain jobs to women); *Newark Branch, NAACP v. City of Bayonne*, 134 F.3d 113 (3d Cir. 1998) (state residency requirement); *EEOC v. Allegheny County*, 705 F.2d 679, 682 (3d Cir. 1983) (rejecting state law which required an ADA violation); *Le Blanc v. S. Bell Tel. and Tel. Co.*, 333 F. Supp. 602, 608-09 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir. 1972), cert. denied 409 U.S. 990 (1972) (state law prohibiting employment of women in certain jobs); *EEOC v. Monarch Mach., Tool Co.*, 737 F.2d 1444, 1451-52 (6th Cir. 1984) (state law prohibiting paying women the same rate as men and denying women the right to work certain jobs); *Manning v. Int'l Union*, 466 F.2d 812, 815 (6th Cir. 1972), cert. denied, 466 U.S. 812 (1973) (state law prohibiting females from working at certain jobs); *Brown v. City of Chicago*, 8 F. Supp. 2d 1095, 1112 (N.D. Ill. 1998), affd. 200 F.3d 1092 (7th Cir. 2000) cert. denied, 531 U.S. 821 (2000) (state law requiring rank order selection from test scores on police promotional tests given by the employer); *Grann v. City of Madison*, 738 F.2d 786, 792 (7th Cir. 1984), cert. denied, 469 U.S. 918 (1984) (state law setting rates of female salaries in comparison to those of men); *Hays v. Potlach Forests, Inc.*, 465 F.2d 1081, 1082 (8th Cir. 1972) (sex discrimination case challenging employer's following state requirement setting overtime pay for women); *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971), 519 F.2d 527, 529 (9th Cir. 1975) (state law denying women the right to be hired into certain jobs involving physical skills and limiting the hours of work for women)

Consistent With Every Court That Has Considered The Issue

The City's second theory, that the testing program is a "licensing activity conducted outside of an employment context," Pet. at 11, is similarly unavailing. The decisions cited by the City as conflicting with that rendered by the Second Circuit here do not support the City's position. Rather, they stand solely for the proposition that a licensing agency having no employment relationship whatsoever with Title VII plaintiffs is not an employer within the meaning of the statute.[36]

The Tests at issue here were used as *de facto* civil-service examinations for public school personnel—not licensing tests—and courts routinely apply Title VII to civil service or state exams, the passage of which—like the Test here—is required exclusively for public employment.[37] Indeed, in other jurisdictions, where individual school districts have used teacher test scores like local civil service

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[36] *Fields v. Hallsville Indep. Sch. Dist.*, 906 F.2d 1017, 1020 (5th Cir. 1990), cert denied, 498 U.S. 1026 (1991) (teacher licensing board not liable under Title VII because not an employer); *Tyler v. Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975), cert denied, 426 U.S. 940 (1976) (rejects suit against licensing board because "Title VII does not apply by its terms, of course, because the Georgia Board of Bar Examiners is neither an 'employer,' an 'employment agency,' nor a 'labor organization' within the meaning of the statute"); *Woodward v. Va. Bd. of Bar Exam'rs*, 598 F.2d 1345, 1346 (4th Cir. 1979) ("The Board of Bar Examiners is neither an 'employer,' an 'employment agency' nor a 'labor organization' within the meaning of the Act"); *George v. N.J. Bd. of Veterinary Med. Exam'rs*, 794 F.2d 113 (3d Cir. 1986) (same); *Haddock v. Bd. of Dental Exam'rs of Cal.*, 777 F.2d 462, 463-64 (9th Cir. 1985) ("Title VII, by its own terms, does not apply to the Board of Dental Examiners...[because it] is neither an 'employer,' an 'employment agency,' nor a 'labor organization' within the meaning of the Act"); *Camacho v. P. R. Ports Auth.*, 369 F.3d 570, 578 (1st Cir. 2004) (Ports Authority not liable under Title VII was merely a licensing agency and not an employer).

[37] *See, e.g., Conn. v. Teal*, 457 U.S. 440 (1982); *Vanguard Justice Soc'y, Inc. v. Hughes*, 471 F. Supp. 670, 696-97 (D. Md. 1979); *U.S. v. City of Yonkers*, 592 F. Supp. 570, 589-92 (S.D.N.Y. 1984).

exams to distinguish among individuals in hiring and compensation decisions—as the City has done here, the courts have not hesitated to apply Title VII.[38] There is no reason why the City's use of New York's flawed civil service exam should not likewise subject the City to Title VII liability. Consistent with this, despite the City's protestations to the contrary, other courts have routinely held that government agencies are subject to Title VII by virtue of their imposition of a discriminatory certification examination requirement upon teachers, and this principle has been applied to hold both state[39] and local[40] government agencies liable for the civil rights violation.

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[38] *See U.S. v. State of S.C.*, 445 F. Supp. 1094, 1097 (D.S.C. 1977), *aff'd sub nom. Nat'l Educ. Ass'n v. S.C.*, 434 U.S. 1026 (1978); *Richardson v. Ala. State Bd. of Educ.*, 935 F.2d 1240 (11th Cir. 1991); *Allen v. Ala. State Bd. of Educ.*, 976 F. Supp. 1410 (M.D. Ala. 1997), 983 F. Supp. 1084 (M.D. Ala. 1997), *aff'd.*, 164 F. 3d 1347 (11th Cir. 1999) (local school liable under Title VII for refusing to hire a teacher applicant on the basis of her failure to obtain a state license unlawful under a disparate impact theory); *Boston Chapter, NAACP, Inc. v. Beecher*, 371 F. Supp. 507 (D. Mass. 1974), *aff'd.*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (local fire department liable under Title VII for relying on state created civil service exam which had a disparate impact); *Bronze Shields, Inc., v. N.J. Dep't of Civil Servants*, 667 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982) (same).

[39] *See, e.g., York v. Ala. State Bd. of Educ.*, 581 F. Supp. 779 (M.D. Ala. 1983) (certifying Title VII class action and issuing a preliminary injunction prohibiting the enforcement of a test requirement that had an adverse racial impact upon African American teachers); *Allen v. Ala. State Bd. of Educ.*, 190 F.R.D. 602 (M.D. Ala. 2000) (approving settlement of Title VII suit challenging Alabama's public school teacher certification process); *U.S. v. State of N.C.*, 400 F. Supp. 343 (E.D.N.C. 1975) (issuing injunction to preclude use of NTE as test used in violation of the Equal Protection Clause), *vacated*, 425 F. Supp. 789 (E.D.N.C. 1977); *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974) (desegregation suit successfully challenging Massachusetts' misuse of the NTE and its adverse impact), *aff'd*, 509 F.2d 580 (1st Cir. 1974); *Ga. Ass'n of Educators, Inc. v. Nix*, 407 F. Supp. 1102 (N.D. Ga. 1976) (successful civil rights action against Georgia challenging examination requirement for teacher certification).

The City's argument fares no better upon review of the facts. In New York, teacher tests have never been licensing tests—they have simply never been used as a means to regulate an entire profession.[41] New York State Constitutional provisions, statutory enactments, and regulatory promulgations pertaining to the operation of the public school system do not apply to New York's *private* kindergarten, *private* elementary, and *private* secondary schools.[42] In particular, none of the provisions of the Education Law or the State Commissioner's regulations relating to the employment of teachers applies to private school teachers. Most notably, private school employees are not required by the State to possess credentials of any kind.[43] Passing the Test and obtaining State certification, are requirements *only* for employment in the public school system, not for private employment.[44] None of these facts have been—nor could be—challenged by the City. Moreover, as the record in this case makes undisputedly plain, hundreds (if not thousands) of teachers taught in City public schools during the period at issue despite having

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[40] *See, e.g., Fickling v. N.Y. Dep't of Civil Servants*, 1997 U.S. App LEXIS 5443 (2d Cir. 1997) (affirming judgment that found defendant county and defendant New York State Department of Civil Service jointly and severally liable for violating the Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.*, and N.Y. Exec. Law § 296); *Molnar v. Booth*, 229 F.3d 593, 605 (7th Cir. 2000) (affirming the imposition of attorneys' fees jointly and severally in a Title VII and § 1983 case, explaining that where defendants actively participate in a constitutional violation, they can be held jointly and severally responsible for indivisible attorneys' fees). *See also Stanley v. Darlington County Sch. Dist.*, 879 F. Supp. 1341 (D.S.C. 1995) (In a Title VI case, the court held that because the State actively participated in creating, maintaining, and perpetuating a dual school system, the District and its taxpayers should not alone be obligated to bear the entire burden of remedying the effects of state imposed segregation. The State is jointly responsible for the problem, and is jointly liable for the remedy), *reversed, in part, Stanley v. Darlington County Sch. Dist.*, 84 F.3d 707 (4th Cir.1996).

[41] *See AMAE II*, 231 F.3d at 583-84.

[42] *See, e.g.*, Educ. Law § 3001 (requiring only public school teachers to meet the State's requirements for certification).

[43] *See* Educ. Law §§ 2569; 3001.

[44] Educ. Law §§ 3001; 3009; 3010.

never passed the Tests. For those teachers, the Test was used only to make employment decisions concerning the amount of their salary, their pensions, their seniority, and their other benefits.

As the Second Circuit's recounting of the history of teacher credentialing in New York shows, for many years the New York City Board of Education had the authority to set its own credentialing requirements for City public school teachers, with the sole limitation that City teachers had to meet minimum State qualifications.[45] In sum, the City's claims that it was rigidly constrained to follow the State's dictates, and that the testing program and its effects operated "outside of an employment context," Pet. at 11, simply are not supported by the facts. The City unequivocally maintained control over the use of the Tests as well as the employment consequences of teachers' failure to achieve a passing score.

III. THE STATE IS NO LONGER A PARTY AND CANNOT APPEAR BEFORE THE COURT AS SUCH

The principle is well established that an actual live controversy must be extant at all stages of certiorari review in order for the matter to meet the Court's Article III "case and controversy" requirements.[46] Where there is no longer a dispute between initially contesting parties—as is the situation here with regard to the New York State Education Department and the Plaintiff class in the wake of the Second Circuit's dismissal of the State from the case—Article III limits the power of the courts to entertain that aspect of the matter further.[47] For the same reason, Article III standing rules presumably would preclude the State's

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[45] *Gulino III*, 460 F.3d at 366-67.

[46] *See Preiser v. Newkirk*, 422 U.S.395, 401 (1975); *Defunis v. Odegaard*, 416 U.S. 312, 319 (1974).

[47] As a general proposition, this Court has steadfastly refused to divert from the principle that "the successful party below has no standing to appeal" from a judgment in that party's favor. *Pub. Serv. Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939).

participation in the proceeding before this Court because it lacks a present stake in the outcome.[48]

Finally, Rule 12 of the Rules of this Court indicates that only parties may participate in the party briefing for review on certiorari. The language of Rule 12.4 providing that "[a]ll *parties* other than petitioners shall be respondents," does not appear to contemplate the participation as respondents of litigants dismissed out of the case. For these reasons, the Court should refuse the State's submission in this matter.

CONCLUSION

For all of the foregoing reasons, Respondents urge the Court to deny the petition.

Respectfully submitted,

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October 29, 2007

[48] *See Josiah Bunting, III v. Mellen*, 541 U.S. 1019 (2004) (denying petition for a writ of certiorari).

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SUPREME COURT

No. 07-270

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE NEW YORK CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

ELSA GULINO, MAYLING RALPH and PETER WILDS, on behalf of themselves and all other similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT NEW YORK STATE EDUCATION DEPARTMENT IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

The State of New York requires public school teachers, like other professionals, to pass a licensing examination. The State does not employ those teachers, however; they work for local school districts.

The questions presented are:

1. Is an employer, such as local school district, liable under Title VII of the Civil Rights Act of 1964 for the disparate impact of a state-mandated licensing examination that the employer neither created nor administered?

2. If so, must the employer demonstrate that the licensing examination has been formally validated as an employment test for every position for which state law requires a professional license?

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PRELIMINARY STATEMENT

Respondent New York State Education Department supports the petition for a writ of certiorari filed by the New York City Board of Education. Although the State Education Department is not listed in the petition's caption, it was a party to the proceedings below, *see* Pet. at ii, and it therefore is a respondent in this Court. *See* S. Ct. R. 12(6).

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 460 F.3d 361. The order of the court of appeals denying rehearing or rehearing en banc (Pet. App. 123a-124a) is not reported in the *Federal Reporter*.

The opinion of the district court rendered after trial (Pet. App. 57a-122a) is not published in the *Federal Supplement*. A prior opinion of the district court denying defendants' motions for summary judgment is reported at 236 F. Supp. 2d 314 (S.D.N.Y. 2002).

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2006 (Pet. App. 1a). The petition for rehearing was denied on May 30, 2007 (Pet. App. 123a). The petition for certiorari was timely filed on August 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The State of New York exercises its police powers to protect the public from unqualified teachers by requiring that public school teachers pass a licensing examination. Plaintiffs

are a class of African-American and Latino teachers who failed the state licensing examination and therefore could not obtain permanent jobs with the New York City Board of Education (Pet. App. 58a). They allege that the licensing examination has a disparate impact on minority candidates (Pet. App. 58a). Because of this, they claim that the City Board of Education — which has no control over the state licensure process — violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, when it refused to hire them. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (recognizing that Title VII prohibits employment practices that, while facially neutral and not intended to discriminate, have an unjustified disparate impact on a protected class of employees or applicants).

1. New York's Constitution requires the State to "provide for the maintenance and support of a system of free common schools, wherein all children of this state may be educated." N.Y. Const. art. XI, § 1. The Board of Regents of the State of New York, through the Commissioner of Education and the State Education Deaprtment, has broad oversight of the public school system in the State. *Id.* art. XI, § 2; art. V, §4; N.Y. Education Law §§ 201, 202, 301, 302, 305. Among other things, the Commissioner has the power to promulgate regulations governing the examination and certification of teachers employed in all public schools in the State. N.Y. Education Law §§ 3001, 3004(1).

The State of New York, however, does not employ teachers or otherwise operate the thousands of public schools in New York State. New York's Constitution provides that local school boards make the basic decisions regarding the operation of their own schools. *See Paynter v. State*, 100 N.Y.2d 434, 442 (2003). Among other things, the school boards of the nearly seven hundred local school districts in

New York establish their own operating budgets, provide equipment and supplies, build and maintain public school facilities, and hire and assign personnel. In particular, local school boards are vested with the authority to "employ . . . as many legally qualified teachers as the schools of the district require" and "to determine the rate of compensation of each teacher." N.Y. Education Law § 1604(8); *see also* N.Y. Education Law § 3011(1) (granting local school boards the authority to negotiate labor agreements with teachers' unions over details such as the length of the terms of employment, the amount of compensation, and when such compensation is due).

Since 1991, New York State has required all regular public school teachers to be licensed under a single statewide standard (Pet. App. 11a). Persons seeking permanent full-time employment as classroom teachers must pass New York State Teacher Certification Examinations, which include separate assessments of pedagogy, specific content tests, and basic familiarity with the liberal arts and sciences. *See* 8 N.Y.C.R.R. § 80-1.5. Only one component of the certification examinations is at issue, the Liberal Arts and Sciences Test ("LAST") (Pet. App. 12a n.7).

The LAST was developed jointly by the State Education Department and National Evaluation Systems, a private company with national experience in developing statewide teacher licensing tests, to test basic knowledge of the liberal arts and sciences (Pet. App. 12a). It is a pass-fail examination that covers topics such as mathematics, history, the humanities, basic communication skills, and written analysis and expression (Pet. App. 13a). To pass the examination, a candidate must correctly answer about two-thirds of the scored multiple-choice questions and receive three out of five points on the essay section (Pet. App. 13a). The LAST is scored in such a way that a candidate can receive low scores

on one section and still pass by receiving sufficiently high scores on other sections (Pet. App. 13a). There is no limit to the number of times that a candidate may take the LAST.

National Evaluation Systems administers the test for the State of New York at many locations and times throughout the State each year. After each administration, the State Education Department and the testing company evaluate the scores item by item to determine whether the questions are appropriate for continued use.

New York City and its Board of Education played no role in the development of the LAST, and they do not participate in its administration or scoring.

2. Plaintiffs sued both the City Board of Education and the State Education Department, claiming that the LAST has a disparate impact on minority candidates in violation of Title VII (Pet. App. 14a). The State Education Department moved for summary judgment, arguing that it was not liable under Title VII because Title VII covers only activities by an "employer" (Pet. App. 14a). Because public school teachers are employees of the City Board of Education rather than the State Education Department, the Department argued that its licensing activities — which fall under the State's police powers — are not subject to challenge under Title VII (Pet. App. 14a). The district court denied the State Education Department's motion (Pet. App. 14a). The court also rejected the City Board of Education's argument that it was not liable under Title VII because it merely complied with state law when it declined to retain or hire teachers who had failed the state-mandated licensing exam (Pet. App. 14a). The district court denied permission to take an interlocutory appeal from this decision.

The district court then proceeded to trial on the merits of plaintiffs' claim. To prevail on a Title VII disparate-impact claim, a plaintiff must first show that as a statistical matter, a particular employment practice disproportionately disadvantages members of a protected class, such as a racial or ethnic minority. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i). If the plaintiff meets this burden, the employer must establish that the challenged employment practice is "job related for the position in question and consistent with business necessity." *Id.* Employers often demonstrate the job-relatedness of employment tests through validation studies formally proving that the test is "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). A plurality of this Court has indicated, however, that "employers are not *required*, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance." *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (emphasis added).

After a lengthy trial, the district court found that the LAST had a prima facie disparate impact on African-American and Latino candidates for licensure (Pet. App. 118a). And while the State Education Department introduced voluminous documentary and expert evidence to support the validity of the LAST, the district court found that this was not adequate to validate the test formally under the standards for employment tests (Pet. App. 119a). Based on the plurality opinion in *Watson*, however, the court concluded that even without a formal validation study, the defendants had demonstrated that the LAST was job related because basic knowledge of liberal arts and sciences was manifestly relevant to public school teachers' jobs, and that plaintiffs

had not proffered a less discriminatory alternative that adequately measured the base level of knowledge required for teacher licensure (Pet. App. 119a-121a). Accordingly, the district court entered judgment in defendants' favor.

3. The court of appeals reversed in part and remanded (Pet. App. 3a). The court held that the State Education Department cannot be sued under Title VII because it is not the plaintiffs' employer within the meaning of the statute (Pet. App. 22a). The court also acknowledged that the State Education Department was exercising core state police powers — regulating the quality of public school teachers — when it developed and implemented the LAST as a licensing exam (Pet. App. 29a). Nevertheless, the court held that the City Board of Education could be held liable for the disparate impact of state licensing requirements on the Board's actual and prospective employees (Pet. App. 41a).

On the merits, the court of appeals agreed with the district court's factual finding that the plaintiffs had demonstrated a prima facie case that the LAST has a disparate impact on racial minorities, but it held that the district court had applied the wrong legal standard in assessing whether the LAST was job related under Title VII (Pet. App. 44a, 49a). Although it acknowledged the *Watson* plurality's contrary statement, the court applied earlier circuit precedent requiring that employment tests be formally validated to satisfy a defendant's burden of demonstrating that a test is job related (Pet. App. 50a-51a). The court of appeals remanded for further proceedings in the district court as to the City Board of Education only (Pet. App. 55a-56a).

The court of appeals denied the City's petition for rehearing (Pet. App. 124a). On the City's motion, however, it stayed issuance of the mandate pending this Court's decision whether to grant the petition.

REASONS FOR GRANTING THE PETITION

The City Board of Education's petition presents at least two questions that deserve this Court's attention: Are state licensing examinations subject to challenge in a suit against local employers under Title VII's disparate-impact provisions? And if so, must they be formally validated as employment examinations?

A. This Court should resolve when, if ever, a licensing examination can be challenged under Title VII's disparate-impact provisions.

The decision below contributes to ongoing confusion in the lower courts over whether state-mandated licensing examinations are subject to challenge under Title VII. That question is significant because a federal claim that licensing examinations have a disparate impact would be available only if such examinations are covered by Title VII. If instead they can be challenged only under 42 U.S.C. § 1983, then they are unlawful only if they intentionally discriminate on the basis of race or another suspect classification, as the Constitution does not prohibit a State from engaging in practices that merely have a disparate impact. *See Washington v. Davis*, 426 U.S. 229 (1976). In rejecting the argument that disparate-impact analysis should apply under the Constitution, this Court explained that it would not be appropriate to import Title VII's employment-related validation standards to other contexts, including licensing requirements. *Id.* at 248.

1. Several federal appellate courts have held that a State cannot be sued under Title VII for its licensing activities. The Fifth Circuit, for example, has held that Texas could not be sued under Title VII for its teacher-certification test, recognizing that the State's role in administering the test is

"analogous to that of state bar administrators and other state licensing or certification agencies" that are not susceptible to Title VII lawsuits. *Fields v. Hallsville Indep. Sch. Dist.*, 906 F.2d 1017, 1020 (5th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). Similarly, the Third, Fourth, and Ninth Circuits have held that Title VII does not cover the licensing activities of the state agencies that regulate veterinarians, lawyers, and dentists, respectively. *George v. N.J. Bd. of Veterinary Med. Exam'rs*, 794 F.2d 113, 114 (3d Cir. 1986); *Woodard v. Va. Bd. of Bar Exam'rs*, 598 F.2d 1345, 1346 (4th Cir. 1979) (per curiam); *Haddock v. Bd. of Dental Exam'rs*, 777 F.2d 462, 464 (9th Cir. 1985). And the First Circuit has applied the same analysis under the Age Discrimination in Employment Act to an agency that licensed harbor pilots. *Camacho v. Puerto Rico Ports Auth.*, 369 F.3d 570, 578 (1st Cir. 2004).

Before this case, courts of appeals had applied Title VII's disparate-impact analysis to state licensing requirements only in narrow circumstances not found here. First, the Ninth Circuit subjected a teacher licensing exam to disparate-impact scrutiny — although it ultimately concluded that the exam passed that scrutiny — because it concluded that the State was in fact the employer of the teachers and thus subject to suit under Title VII. *See AMAE v. California*, 231 F.3d 572 (9th Cir. 2000) (en banc); *see also id.* at 602 (Kleinfeld, J., concurring in part and dissenting in part) (calling the majority's opinion "cert bait" because it subjected state licensing boards to Title VII). The Second Circuit expressly found that the unusual circumstances that led the Ninth Circuit to conclude that the State was the employer in *AMAE* do not exist here (Pet. App. 30a-31a). Second, the Eleventh Circuit held that a local school district was liable for the disparate impact of a state licensing exam, but in that case (1) the State no longer used the exam because it had entered a consent decree in response to separate disparate-impact

litigation and (2) the school district had not sought a waiver of licensing requirements even thought the State had granted such waivers in the past. *Richardson v. Ala. State Bd. of Educ.*, 935 F.2d 1240, 1246 (11th Cir. 1991). The school district thus was at least on notice that the exam had an unjustified disparate impact and had a means under state law to avoid that impact. Nothing of the sort is true here.

The decision below goes farther than any other appellate ruling has, because it allows plaintiffs to challenge the disparate impact of a state-mandated licensing exam in a suit against their employer — not the State, which is the real party in interest — and even where the employer would have no reason to question the validity of the exam. That ruling is in substantial tension with the rulings of the First, Third, Fourth, and Fifth Circuits, which hold that a State's licensing activities are not subject to challenge under Title VII. While the earlier cases may be theoretically distinguishable because they involved suits against the State rather than the employer, a ruling that the State cannot be subject to suit for its licensing requirements implies that the licensing requirements themselves are beyond challenge. It makes considerably less sense to subject an employer to liability merely for complying with state licensing requirements that it cannot control than to subject the State to a direct lawsuit challenging those requirements.

The Second Circuit's ruling leaves both the State and the employer in untenable positions. The State is left in an untenable position because, while it cannot be sued directly under Title VII for the disparate impact of its licensure tests, the tests' validity nonetheless will be decided in the State's absence. There is no guarantee that the employer will defend the test adequately, particularly because often — as here — the State's contract with the outside test designer will prohibit it from sharing with other parties the highly confidential test-

development material that might be crucial to establishing job-relatedness. Some employers who are sued might even welcome a court order striking down the licensing test because it would expand their pool of potential employees. The State, of course, would not be bound by any finding of invalidity in a case solely against the employer, and it thus could continue to insist that its licensing rules be followed.

To guard against that sort of chaos, the State might have no choice but to seek to intervene in all cases involving a disparate impact challenge to a licensing exam, assuming the State somehow knew about those cases. If the State felt compelled to intervene, however, it would in practice render a dead letter the holdings of cases like *Fields*, *George*, *Woodard*, and *Haddock* that state licensing bodies are not subject to suit under Title VII.

The Second Circuit's decision places employers — public and private alike — in an equally untenable position. Employers do not design, administer, or validate state-mandated tests. They are in no position to judge whether the State's licensing examinations have a disparate impact on minorities and, if so, whether the tests are valid or job-related. They are in no position to demonstrate the validity of the state-mandated examinations in Title VII litigation. Yet the decision below subjects such employers to liability for damages and injunctive relief in Title VII disparate-impact lawsuits for tests as to which they have no input and over which they have no control.

2. While the Second Circuit recognized that it was placing the City Board of Education in a "difficult situation" (Pet. App. 41a), it apparently felt compelled to do so by 42 U.S.C. § 2000e-7, which preempts state laws that "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII

(Pet. App. 39a). But that statute does not apply here. There is no question that § 2000e-7 preempts facially discriminatory state labor laws, such as laws that limit how many hours women (but not men) work or how much weight they are allowed to lift. *See, e.g., Williams v. Gen. Foods Corp.*, 492 F.2d 399, 402 (7th Cir. 1974) (state law providing that women may not work more than forty-eight hours per week nor more than nine hours on one day per week); *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225-26 (9th Cir. 1971) (state law providing that woman may not lift more than fifty pounds). The statute also may apply when an employer relies on a state-mandated practice that, while facially neutral, already has been found to be unlawfully discriminatory. *Cf. Richardson*, 935 F.2d at 1246 (holding that an employer was liable for a state licensing test when the State no longer used the test because of a consent decree).

But the statute should not apply when the employer has no reason to know that the practice is discriminatory. The court of appeals' decision to the contrary presents employers with the Hobson's choice of either (1) flouting a facially valid licensing regime and subjecting themselves to liability to the State or (2) complying with the regime and subjecting themselves to liability to employees if the licensing examination ultimately is shown to have a disparate impact. Nothing in § 2000e-7 suggests that employers must guess the correct answer to this dilemma at their own peril.

This reading of § 2000e-7 is supported by standard canons of statutory construction. The Second Circuit's broad interpretation of the provision effectively reads Title VII as preempting state laws establishing minimum qualifications for licensure. But when a federal statute like Title VII alters the balance of federal and state powers, the courts will apply it only in contexts where it is "unmistakably clear" that Congress intended to do so. *Gregory v. Ashcroft*, 501 U.S.

452, 460-61 (1991); *see also English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (warning that preemption of "areas that have been traditionally occupied by the States" is inappropriate absent a "clear and manifest" congressional intent to supersede state law). As the Second Circuit recognized, allowing plaintiffs to sue the State under Title VII for implementing a licensing test would alter the federal balance in a manner that Congress did not clearly intend (Pet. App. 28a). Allowing the same suit against the City Board of Education or any other employer, however, intrudes just as much on core state police powers, because the net result — federal limitations on state licensing regimes — is the same. That reading of Title VII thus would alter the federal-state balance, and Congress has not made it unmistakably clear that it intended to do so. *See Haddock*, 777 F.2d at 464 (legislative history "is barren of any reference to state licensing agencies or the many persons licensed by them").

3. The effects of the Second Circuit's decision in this case extend far beyond the LAST, and far beyond New York State.[1] New York, like other States, requires licensing tests for a wide array of professions. *See, e.g.*, N.Y. Education Law § 6524(4) (doctors); *id.* § 6604(4) (dentists); *id.* § 7206(4) (professional engineers); *id.* § 7304(4) (architects); *id.* § 7404(4) (certified public accountants); *id.* § 8305(1)(d) (interior designers); N.Y. Judiciary Law § 53(3) (lawyers); N.Y. Real Property Law § 441(1)(b) (real estate brokers). Those tests and myriad other licensing

1. Even if the decision were limited to the LAST, it could affect 695 other school districts in New York State, ranging from the large and urban to the small and rural, which together employ more than 200,000 teachers. *See* N.Y. State Educ. Dep't, *Number of Public School Districts by Type, available at* http://www.emsc.nysed .gov/irts/educationstats/edstats-07/table2.pdf; N.Y. State Educ. Dep't, *Professional Staff in Public Elementary and Secondary Schools, available at* http://www.emsc.nysed.gov/irts/educationstats /edstats-07/table6.pdf.

examinations now are subject to challenge under Title VII as well, in New York and elsewhere.

For example, the decision below would permit a lawyer who failed the state bar exam to sue a private law firm because the bar exam has a disparate impact. In New York, as elsewhere, there are gaps between the pass rates for different ethnic groups on the bar exam. *See* Michael Kane *et al., Impact of the Increase in the Passing Score on the New York Bar Examination* 6 (2006), *available at* http://www.nybarexam.org/ncberep.pdf. Under the court of appeals' ruling here, an applicant for an attorney position who had been unable to pass the bar exam may sue the firm, asserting that the exam does not accurately measure the job skills needed for attorneys and that Title VII therefore prohibits law firms from refusing to hire someone as an attorney merely because he failed the bar exam.

The same situation could occur for the dozens of other professions that are subject to licensing requirements, which are meant to protect the public from unqualified practitioners. The prospect of such litigation, regardless of its ultimate outcome, would expose private defendants to substantial litigation costs to defend decisions they could not control and did not make. Those employers would bear the nearly insurmountable burden of validating a test that they did not create, design, or administer. Although they cannot be sued directly under Title VII, States would face the choice of seeking to intervene to protect their licensing regimes or risking the prospect of a court order that an employer must hire unlicensed professionals.

4. Although the Constitution does not require it to do so, New York takes seriously the disparate impact of licensing examinations like the LAST and looks for ways to narrow the performance gap. But it is well recognized that minorities

have achieved lower scores on most standardized tests and that the most important factor explaining this discrepancy is that minority groups have historically had less access to high-quality education. *See* Karen J. Mitchell et al., Nat'l Research Council, *Testing Teacher Candidates: The Role of Licensure Tests in Improving Teacher Quality* 99-111 (2001) (included in the record as the State's Exhibit 123). The disparate pass rates for teacher licensing tests are comparable to those for licensing tests for lawyers, physicians, and other licensed professions. *Id.*

As the testimony in the trial court indicated, New York found distressing correlations between low student performance and high numbers of uncertified teachers — particularly in schools with poor and minority student populations, where children were often trapped in a cycle of being poorly educated by underqualified teachers (Tr. 1582, 1586). A core rationale for demanding uniform minimum teacher licensing qualifications is to break this cycle. Subjecting those licensing qualifications to disparate-impact analysis makes it harder, if not impossible as a practical matter, for the State to serve the educational needs of its most vulnerable children. The importance of this question is reason enough to grant the petition.

B. This Court should resolve whether licensing examinations must be formally validated as employment tests.

If state licensing exams are now going to be subject to disparate-impact challenges, this Court should address the standard under which those exams are shown to be "job related." In *Watson*, a plurality of this Court stated that standardized exams need not necessarily be formally validated when their job-relatedness is evident on their face. 487 U.S. at 998. The Second Circuit rejected the plurality's

views, however, because it felt bound by pre-*Watson* circuit precedent requiring formal validation studies in all cases involving a standardized test (Pet. App. 51a). The Second Circuit gave no weight to the district court's common-sense observation that the LAST's essay portion has a "manifest relationship to teaching" because "[i]t should go without saying that New York City teachers should be able to communicate effectively in ... written English" (Pet. App. 120a-121a). This case thus may turn on the question left open by *Watson*, and addressed only by the plurality — whether employers are always required to introduce formal validation studies to establish job-relatedness. That question merits this Court's consideration.

The Second Circuit exacerbated the consequences of demanding formal validation by suggesting that a licensing exam might have to be validated under the standards that apply to employment exams (Pet. App. 48a-51a). Licensing exams involve different development and validation methodologies from employment exams. Licensing exams, unlike employment exams, are not designed to rank candidates or predict their performance in particular jobs. Rather, licensing exams establish that candidates meet minimum qualifications to engage in a particular profession. *See generally* Am. Educ. Research Ass'n, *Standards for Educational and Psychological Testing* 64 (1999) (included in the record as the State's Exhibit 121); Mitchell et al., *supra*, at 34-35.

Applying employment-test validation standards would require professional licensing regimes to meet goals, such as predicting on-the-job performance, that they were never intended to fulfill. And because employment tests generally must be validated with respect to the "job or jobs for which candidates are being evaluated," *Albemarle*, 422 U.S. at 431 (quotation marks omitted), plaintiffs challenging licensing

tests could plausibly argue that whatever the validity of a particular licensing regime as a general matter, it is not valid with respect to their particular positions. *See AMAE*, 231 F.3d at 596 (Reinhardt, J., concurring in part and dissenting in part) ("Teachers' jobs are too diverse to be lumped into one or two categories for validation purposes."). To ward off such challenges, the State would be forced to conduct scores of expensive validation studies for every conceivable job as to which a licensing test might apply. Even if that were possible — and even though the licensing tests ultimately might withstand such challenges — the burden on test developers, employers, the State, and the courts would be enormous.

C. This Court should grant the petition now before any proceedings on remand.

This Court frequently grants certiorari to resolve important threshold questions when, as here, a federal court of appeals has reversed the district court's entry of judgment for the defendants and has remanded the case for further proceedings. *See, e.g.*, *Hein v. Freedom From Religion Found., Inc.*, 127 S.Ct. 2552 (2007); *Morse v. Frederick*, 127 S.Ct. 2618 (2007); *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007); *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727 (2007). This Court is particularly willing to do so when the lower court's decision will have immediate adverse consequences. *See generally* Robert L. Stern et al., *Supreme Court Practice* 259-60 (8th ed. 2002) (detailing cases). Here, this Court should grant certiorari now, because otherwise the chief harms that this petition seeks to prevent will come to pass no matter what happens on remand.

First, if the LAST must be defended on remand under the professional-validation standard imposed by the Second Circuit, the City will not be in a position to make that defense.

The State thus may be forced to seek to intervene in this action on remand — thereby subjecting itself to a claim that is not authorized by Title VII and thus barred by the Eleventh Amendment. This Court should not countenance such an end run around the carefully crafted constitutional and statutory limitations on suits against States. Moreover, even if the City prevails with the State's assistance, future Title VII challenges — both to new versions of the LAST and to other state-mandated professional licensing requirements — are likely to follow. And unless this Court grants certiorari now and reverses the decision, licensing requirements in the Second Circuit may be subject to burdensome Title VII disparate-impact litigation for some time, because defendants will not have an opportunity to seek this Court's review on the issue until they actually lose a case. *See Mathias v. Worldcom Techs.*, 535 U.S. 682, 683-84 (2002) ("As a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous."). In *AMAE*, for example, the State could not seek certiorari — notwithstanding the Ninth Circuit's creation of an apparent circuit split — because the majority also concluded that the licensing test at issue was lawful under Title VII. Certiorari is thus warranted to spare parties and the States costly litigation under a dubious legal theory for an indefinite period of time.

Second, during the proceedings on remand — which are likely to be prolonged — the State's teaching-licensing system, designed to protect the quality of education provided to New York's children, will be thrown into disarray. Employers facing disparate-impact challenges to a state licensing test may well decide not to comply with the state licensing requirement while the litigation is ongoing. *Cf. EEOC v. Illinois*, 69 F.3d 167, 170 (7th Cir. 1995) (noting that upon the revision of the federal Age Discrimination in Employment Act to ban mandatory

retirement, "a competently counseled school district" presented with a state-law mandatory retirement requirement "would have told the state to go fly a kite"). Since it will be possible in many cases, as it was here, for the plaintiffs to establish a prima facie disparate impact, the litigation may be protracted; this case, for example, has already lasted eleven years. And faced with years of legal uncertainty, the States themselves may themselves feel compelled to suspend their licensing requirements until the issue is finally resolved. The State of Alabama, for example, entered into a consent decree in a Title VII lawsuit that for over ten years effectively prevented it from requiring a teacher certification examination. *See Allen v. Ala. State Bd. of Educ.*, 190 F.R.D. 602, 605 (M.D. Ala. 2000). Thus, without early resolution of the questions presented here, state licensing requirements may be disrupted for years, regardless of whether they are ultimately proven lawful under Title VII standards.

Third, the Second Circuit's decision creates uncertainty for the developers of professional licensing examinations. The court's application of employment-test standards to professional licensing makes it difficult to discern how licensing tests are to be validated, given that up until now professional norms and practical realities have dictated that licensing and employments tests be validated differently. Licensing-test developers may feel compelled in the interim to try to meet the Second Circuit's inappropriate standards, which — if the Second Circuit's standard ultimately proves to be incorrect — means unnecessary delay and expense.

Because the States and employers within the Second Circuit face immediate consequences regardless of who prevails on remand, this Court should grant certiorari now to resolve the threshold question of whether this lawsuit can proceed at all. There is no need for further factual development on the questions presented, and a remand thus is not needed to ensure an adequate record for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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No. 07-270

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE NEW YORK CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

ELSA GULINO, MAYLING RALPH and PETER WILDS, on behalf of themselves and all other similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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This supplementary brief is submitted in reply to new points raised by the United States in their Brief as Amicus Curiae.

ARGUMENT

In an amicus curiae brief dated May 23, 2008, the United States has taken the anomalous position that although the Second Circuit did indeed commit the serious and damaging error of law asserted by petitioner, the petition for a writ of certiorari should be denied. The United States' brief expressly reaches the same legal conclusion as that advocated by petitioner, *i.e.*, that "petitioner is not liable under Title VII for complying with a facially neutral licensing regime that limits the universe of potential employees to those who have complied with the State's requirement." U.S. Br. at 9. Nonetheless, the U.S. argues that a writ of certiorari is not warranted in this case because: (1) "The court of appeals' decision does not conflict with any decision by this Court or another court of appeals" (U.S. Br. at 15); (2) "on appeal petitioner appears to have abandoned the argument that an employer's compliance with state licensing requirements does not violate Title VII" (U.S. Br. at 17); and (3) the case's interlocutory posture is not conducive to review (U.S. Br. at 18).

The U.S. is mistaken on each point. Its brief mischaracterizes petitioner's main argument which, although different in emphasis from the U.S's own formulation as to why the court of appeals was in error, is the same in its essential substance. The U.S. also misses the underlying principle that renders the Second Circuit's decision incompatible with the holdings

of other courts of appeals. Finally, declining to review the Second Circuit's decision because of the interlocutory posture of the case would, as set forth by the U.S. itself, place petitioner is an untenable position at trial.

Petitioner argued before the Second Circuit that it could not be found liable under Title VII because State law mandated that it could only hire or retain, and issue New York City licenses to, applicants who passed the State licensing test i.e. that under governing state law a New York City license to be a full-time teacher was tied to the applicant's passing the State licensing test. Indeed, as stated in petitioner's brief submitted to the court of appeals, "Some of the plaintiffs aver that they had received regular New York City teaching licenses, but, because they failed to pass the NTE and/or the LAST those licenses were terminated and they were essentially 'demoted' to the substitute position." Municipal Appellee's Brief, submitted to the Second Circuit, at p. 7. Thus petitioner did argue before the Second Circuit that its role as employer and City-licensor of City teachers is constrained by State licensing laws and in such capacity it should not be subject to liability under Title VII. This position, although formulated differently, is not significantly distinguishable in substance from the U.S.'s own assertion that Title VII "does not expose to liability an employer who gives effect to a state licensing requirement." U.S. Br. at 14.

The U.S. is likewise mistaken in arguing that the Second Circuit decision is compatible with determinations by other circuits holding that Title VII

is not applicable to licensing activity. Regardless of petitioner's separate status as an employer, the conduct for which it has been held potentially liable is that of complying with state licensing law and of denying regular City licenses to teachers who do not meet state licensing requirements. The U.S.'s own enumeration, on pages 9-15 of its brief, of why petitioner cannot be liable under Title VII underscores the error in the Second Circuit's defining petitioner's status as strictly that of an employer rather than as an entity whose employment decisions must comply with the State's licensing mandates. As stated by U.S. Brief at 11-12,

> "The resulting uncertainty [arising from liability faced by employers under the Second Circuit decision] could jeopardize not only the employer, but also the State's interest in enforcing its licensing requirements. . . . [The State's] traditional police power would be ill served by the court of appeals' decision, as some employers might choose not to follow important licensing requirements. . . ."

State-mandated licensing activity, which various circuits have said is not subject to Title VII, may be undermined or compromised where compliance subjects employers to Title VII liability for compliance, or to state sanctions for noncompliance. The Second Circuit holding is not compatible with the determinations of those courts.

Finally, the U.S. argues that certiorari should be denied because of the interlocutory posture of the case. The Brief hypothesizes that the remand may focus not on the validity of the LAST but rather "on whether

petitioner misused the test by imposing adverse consequences on respondents that were *not* required by state law." U.S. Br. at 18 (italics in original). It is clear from the Second Circuit opinion that the main issue on remand will be whether petitioner can validate the LAST, i.e. whether the employer can validate the State's licensing test. Such a trial would place petitioner in an untenable position. As the U.S. recognizes, "[E]ven attempting to try such a case would pose serious practical problems. Defendants bear the burden of proof on the business-necessity defense, . . . but an employer would be ill equipped to shoulder that burden with respect to a state-mandated licensing test . . . ." U.S. Br. at 12.

In short, the U.S. eloquently lays out the case for finding that the Second Circuit erred in finding petitioner to be potentially liable. The Brief further makes clear the jeopardy in which all state licensing schemes are placed by the court of appeals' decision. Petitioner respectfully urges that this Court be guided by that portion of the U.S. Brief that delineates the fundamental unfairness and truly damaging consequences of the Second Circuit determination, rather than by the recommendation against the granting of certiorari, which relies on technicalities and an exaggerated focus on the differing emphasis of petitioner's argumentation.

CONCLUSION

For the reasons set forth, the City respectfully asks this Court to grant its petition for a writ of certiorari.

Respectfully submitted,

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Petitioner,

v.

ELSA GULINO, MAYLING RALPH and PETER WILDS, on behalf of themselves and all other similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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PRELIMINARY STATEMENT

This brief is submitted, pursuant to Rule 15, in reply to new points raised by respondents in their Brief in Opposition to the Petition for Certiorari.

ARGUMENT

POINT I

THE DISTINCTION, POSITED BY RESPONDENTS, BETWEEN "LICENSES" AND "CERTIFICATIONS" IS OF NO LEGAL CONSEQUENCE.

Contrary to the distinction asserted by respondents, nothing turns on whether the documents governed by the State examination at issue here — the LAST — are called "licenses" or "certifications." *See* BIO at 6.[1] Even if the distinction between licensing and certification tests matters in other contexts, it is irrelevant here. It is indisputable that the State has exercised its police powers to protect the public welfare by setting the minimum level of competency necessary for those who would hold permanent full-time positions as public school teachers. That circumstance, not how the test is labeled, is what is relevant to the question presented to this Court.

In any event, respondents are mistaken in asserting that the LAST is not a licensing test. The Second Circuit concluded that the LAST is part of the State's efforts to

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1. "BIO" refers to respondents' Brief in Opposition to Certiorari.

regulate the quality of public school teachers through licensure requirements. *See* Petitioner's Appendix at 4a n.1, 29a, 37a n.21. That conclusion formed the basis of the Second Circuit's holding that SED is not respondents' employer - a holding that respondents have not challenged in this Court. Refuting respondents' argument that the LAST is not a licensing test because it applies to public school teachers only, the Second Circuit noted that the State regulates private school teachers in comparable ways and has legitimate reasons for treating the two categories separately. *See* Petitioner's Appendix at 38a-39a n.21. Even respondents' own expert, Dr. Frank Landy, testified that the LAST is a licensing test, that licensing tests and employment tests are developed and validated differently, that licensing tests are designed to prevent harm to the general public as distinct from employment tests which are designed to predict job performance, and that the LAST is comparable to teacher licensing tests administered in forty-two states. *See* Tr. 1428-33. The LAST's incontrovertible status as a licensing test is incompatible with the Second Circuit's holding that, under Title VII, BOE is potentially liable for the test's implementation. Accordingly, the question presented in the Petition for Certiorari is squarely before this Court.

POINT II

THERE IS NO NEED FOR FURTHER FACTUAL DEVELOPMENT ON REMAND.

Respondents err further in asserting a need for further factual development on remand. *See* BIO at 8-9. A remand will determine only whether the LAST has a disparate impact not justified by business necessity based on test validation evidence. That issue is not

relevant to the question presented in the Petition for Certiorari. The question raised by petitioners goes to the scope of Title VII and is, therefore, one of pure statutory interpretation. The record relevant to that inquiry is fully developed. The immediate adverse consequences of the Second Circuit's decision are described on pages 16-18 of SED's brief as respondent and demonstrate that this case warrants review. Moreover, deferring consideration of the question presented would subject BOE to the burdens, costs, and risks that the Petition argues should not be imposed on it under the current circumstances.

POINT III

PETITIONER PRESERVED BELOW THE ARGUMENT THAT IT SHOULD NOT BE LIABLE FOR THE DISPARATE IMPACT OF A STATE LICENSURE TEST OVER WHICH IT HAS NO CONTROL.

Contrary to what respondents assert (BIO at 9-10), petitioner preserved in the lower courts the argument that it should not be liable for the disparate impact of a state licensure test over which it had no control. *See, e.g.*, BOE Memorandum in Support of Motion to Dismiss at 2, 10-11 ; BOE Memorandum in Support of Motion for Summary Judgment at 2, 7-9; BOE Proposed Findings of Fact at 54: BOE Respondent's Brief (Second Circuit) at 12-20. By noting that petitioner did not include its legal memoranda in the appendix submitted to the Second Circuit, respondents cite a fact that is both true and irrelevant to the preservation issue. Respondents have conflated the record, defined under Fed. R. App. P. 10(a)(1) as all original papers and exhibits filed in

the District Court, with the appendix, which under Fed. R. App. P. 30(a)(2) may not include memoranda of law except under unusual circumstances. In any event, the parties may rely on parts of the record — including the memoranda — that are not included in the appendix. Fed. R. App. P. 30(a)(2). The trial memoranda demonstrating preservation are indisputably part of the record.

POINT IV

BOE NEVER MAINTAINED CONTROL OVER THE DECISION TO USE THE LAST.

Respondents are also mistaken to suggest that BOE "maintained control" over the decision to use the LAST for teacher candidates. *See* BIO at 16. As the District Court described in exhaustive detail, the LAST was developed by SED with outside experts; BOE played no role. *See* Petitioner's Appendix at 97a-103a. The statutory scheme under which BOE set its own licensure requirements ended in 1991, when the State mandated that all public school teachers must pass a State licensing test. While at one time the State granted BOE temporary exemptions to the licensure requirements because of a severe teaching shortage in New York City, it eventually adopted regulations sharply limiting the use of unlicensed substitute teachers. *See* Tr. at 2329-32. The implementation of the LAST stripped BOE of any control over the matter of which test should serve as a condition for obtaining a public school teachers' license. Thus the LAST is not, and never has been, a "hiring provision" or "employment practice" as defined under Title VII, but rather was and continues to be a generally applicable State-mandated licensing requirement imposed under the authority of the State's police power.

POINT V

SED IS PERMITTED TO FILE A BRIEF WITH THIS COURT BECAUSE IT WAS A PARTY TO THE PROCEEDING IN THE COURT BELOW.

Finally, respondents incorrectly aver that SED should not be permitted to file a brief in this Court. *See* BIO at 16-17. This Court's Rule 12.6 provides that "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court." SED was a party to the proceeding in the Second Circuit and is therefore entitled to file a brief in this Court. Respondents cannot point to a jurisdictional problem because there exists a live case or controversy between BOE and respondents.

In any event, respondents have no cause to complain about SED's filing. Had SED not been a respondent under Rule 12.6, it could have filed a brief as amicus curiae as a matter of right under Rule 37.4 of this Court. That SED, after having been dismissed from the case by the Second Circuit, nonetheless retains a strong enough interest in the outcome to file a brief supporting the petition merely confirms that this case presents an important question of federal law that warrants this Court's review.

CONCLUSION

For the reasons set forth, BOE respectfully asks this Court to grant its petition for a writ of certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, PETITIONER

v.

ELSA GULINO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employer's compliance with a facially neutral state licensing requirement for teachers that allegedly has a disparate impact on members of a protected class may subject it to liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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In the Supreme Court of the United States

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v.

ELSA GULINO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits an "employer" from intentionally discriminating "against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin." 42 U.S.C. 2000e-2(a)(1). Under Title VII, it is also unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individ-

ual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(2). This Court has construed the latter provision to prohibit not only intentional discrimination, but also some facially neutral practices that have an unintentional disparate impact on members of a protected class. *E.g.*, *Smith* v. *City of Jackson*, 544 U.S. 228, 234-235 (2005); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

In 1991, Congress amended Title VII to specify that "[a]n unlawful employment practice based on disparate impact is established under [Title VII] only if * * * a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. 2000e-2(k)(1)(A)(i). If the employer demonstrates that the practice is job related and consistent with business necessity, the plaintiff may still prevail by showing that an alternative employment practice would serve the employer's legitimate interest without causing a disparate impact, and that the employer "refuses to adopt such alternative employment practice." 42 U.S.C. 2000e-2(k)(1)(A)(ii); see also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975).

Title VII defines an "employer" to be "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks * * * and any agent of such a person." 42 U.S.C. 2000e(b). An "employee," in turn, is "an individual employed by an employer," 42 U.S.C. 2000e(f), and "[t]he term 'person' includes one or more individuals, governments, governmental agencies, [or] political subdivisions," 42 U.S.C. 2000e(a).

Title VII does not "exempt or relieve any person from any liability, duty, penalty, or punishment provided by any

present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under" Title VII. 42 U.S.C. 2000e-7. A separate provision specifies that the entire Civil Rights Act of 1964, including Title VII, should not be "construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. 2000h-4.

2. Under New York law, petitioner Board of Education of the City School District of the City of New York "employ[s] * * * as many legally qualified teachers as the schools of the district require." N.Y. Educ. Law § 1604.8 (McKinney 2007). Until 1991, petitioner generally had discretion to establish minimum standards for its teachers. Pet. App. 8a. In 1991, however, the state legislature—exercising its state constitutional authority over the maintenance of public schools, *id.* at 4a—required that teachers in all New York public schools, though not private schools, be licensed under uniform statewide standards. *Id.* at 11a-12a. At that time, the New York State Education Department (SED) used a test called the National Teachers Examination-Core Battery (NTE). *Id.* at 3a, 9a, 12a. Beginning in 1993, SED replaced that test with a set of tests including the Liberal Arts and Sciences Test (LAST). *Id.* at 3a, 12a. Petitioner played no role in the development or administration of the LAST or in the move from the NTE to the LAST. See Pet. App. 3a, 12a-13a; Pet. 6-7.

SED continued to permit petitioner to employ persons who had not passed the LAST as full-time substitute (as opposed to permanent) teachers. Pet. 5; Br. in Opp. 4-5; see Pet. App. 81a. Substitutes could work the same hours as permanent teachers, but were paid less. *Ibid.*

3. In 1996, respondents filed this suit against both petitioner and SED on behalf of a class of African-American

and Latino educators who, among other things, did not pass either the NTE or the LAST. Pet. App. 58a. They alleged that the tests had a disparate impact on African-American and Latino teachers in violation of Title VII. *Ibid.*

SED argued that it was not liable as an "employer" because only petitioner, and not SED, employed respondents. The district court held, however, that "an entity that is not a direct employer of a Title VII plaintiff nevertheless may be liable if it interferes with or 'significantly affects access of . . . [plaintiffs] to employment opportunities.'" *Gulino* v. *Board of Educ. of the City Sch. Dist.*, 236 F. Supp. 2d 314, 332 (S.D.N.Y. 2002), modified, No. 96 Civ. 8414, 2002 WL 31887733 (S.D.N.Y. Dec. 26, 2002) (citation omitted). The court then found "evidence that the State has sufficient control over the operation of local schools to bring it within Title VII's definition of an employer." *Id.* at 333.

The district court also rejected petitioner's argument that it could not be held liable because it "was merely following the mandates of state law." 236 F. Supp. 2d at 333. In the court's view, "the decision to de-certify those teachers who had applied for or received City licenses before 1991 because they did not pass the NTE or the LAST was the Board's," not the State's. *Id.* at 334. The court also held that, even if petitioner "had been acting only under state pressure, that would not suffice to shield it from liability under Title VII," because "Title VII preempts any state laws in conflict with it." *Id.* at 334, 335.

Following a lengthy trial, the district court found that neither the NTE nor the LAST had an impermissible disparate impact under Title VII. Pet. App. 57a-122a. The court determined that respondents had established a prima facie case of discrimination because the NTE and the LAST had a statistically significant adverse effect on African-American and Latino teachers. *Id.* at 79a-82a. The court also found, however, that the NTE and the LAST were job

related and consistent with business necessity, *id.* at 118a-121a, and that respondents "failed to offer a cost effective, practical alternative to the tests used by defendants in certifying teachers," *id.* at 121a.

4. Respondents appealed the dismissal of their claims concerning the LAST, which was first used in 1993 pursuant to the 1991 law requiring all permanent public-school teachers to be licensed under statewide standards. See Pet. App. 11a-12a. Respondents did not, however, challenge the dismissal of their claims concerning the NTE (which was the predecessor of the LAST). *Id.* at 12a n.7. The court of appeals vacated the district court's judgment and remanded for further proceedings. *Id.* at 3a.

The court of appeals first determined that SED cannot be held liable under Title VII for any disparate impact created by its tests. Pet. App. 17a-38a. Looking to the common law of agency, the court held that SED "is plainly not [respondents'] employer for the purposes of Title VII liability" because respondents "fail to meet the threshold showing that SED hired and compensated them," and in any event SED "does not exercise the workaday supervision necessary to an employment relationship." *Id.* at 36a, 37a. Because SED is not respondent's employer, the court found, Title VII provides no cause of action against SED.

In contrast, the court of appeals held that petitioner—which undeniably meets the definition of employer—could be held liable under Title VII if the LAST had a disparate impact. Pet. App. 39a-41a. The court explained that, while petitioner had "argued in the district court that it should not be held liable for an employment practice required by state law," the district court had rejected that contention, and petitioner "does not appear to challenge this finding of the district court." *Id.* at 39a. The court of appeals briefly "note[d]," however, that "the dis-

trict court was correct in holding that the mandates of state law are no defense to Title VII liability." *Ibid.*

As to the argument that petitioner had advanced on appeal, the court of appeals stated that, "[o]n appeal, [petitioner] appears to change its tack. Instead of arguing lack of discretion, [petitioner] asserts that Title VII does not apply because [petitioner's] use of certification tests for licensing 'is a capacity separate and distinct from that of employer under Title VII.'" Pet. App. 39a (citation omitted). After expressing uncertainty as to whether petitioner had raised that contention in the district court, *id.* at 40a n.22, the court of appeals rejected it on the ground that petitioner is "not merely a licensing agency," but instead "acts as [respondents'] 'employer' in the word's ordinary meaning." *Id.* at 40a, 41a. The court "acknowledge[d] the difficult situation that" its holding "creates for" petitioner—by requiring it to defend the results of a test that it did not design and does not administer—but concluded that "Title VII requires this result." *Id.* at 41a.

As to whether the LAST has an impermissible disparate impact under Title VII, the court of appeals concluded that the district court had applied the wrong legal standard and made factual errors. Pet. App. 42a-56a. Accordingly, the court vacated and remanded for further proceedings. *Id.* at 56a. In so doing, the court noted that it did not reach respondents' contention that petitioner had misused the LAST by, among other things, demoting teachers from permanent to substitute status and then paying them less. See *id.* at 16a n.9; Br. in Opp. 4-5. Instead, the court explained that, "[i]f appropriate, the district court may need to address this argument on remand." Pet. App. 16a n.9.

DISCUSSION

The court of appeals held that petitioner is an employer as opposed to a licensor, and that petitioner's compliance

with a facially neutral public education state licensing requirement can give rise to Title VII disparate-impact liability. Pet. App. 39a-41a. The court of appeals was correct on the first of those points and wrong on the second. Petitioner, however, abandoned the latter argument in the court of appeals. Although the court of appeals nevertheless passed on the issue, its discussion of that issue was limited to two conclusory sentences. *Id.* at 39a. The decision of the court of appeals does not conflict with any decisions of this Court or another court of appeals. And this case provides a poor vehicle for considering the question presented at this time, in part because the case is in an interlocutory posture and the lower courts have not yet resolved respondents' contention that petitioner misused the LAST in ways *not* required by state law. Accordingly, the petition for a writ of certiorari should be denied.

A. Title VII Does Not Prohibit Employers From Complying With Facially Neutral State Licensing Requirements

Because petitioner is an employer, not a state licensing agency, it is subject to Title VII's prohibitions. Title VII does not, however, prohibit petitioner from complying with the state licensing requirement at issue.

1. Petitioner primarily argues (Pet. 11) that "licensing activity conducted *outside of an employment context* does not give rise to a cause of action under Title VII" (emphasis added). That is correct as a general matter. Title VII prohibits an "employer" from engaging in specified "unlawful employment practice[s]." 42 U.S.C. 2000e-2(a). Title VII thereby restricts employers' employment practices. As the lower courts have recognized, Title VII does not restrict a sovereign's exercise of its traditional police powers, including the promulgating and enforcement of licensing requirements, in a non-employment capacity. See, *e.g.*, *Camacho* v. *Puerto Rico Ports Auth.*, 369 F.3d 570, 578 (1st Cir. 2004)

(noting "long line of cases" holding that licensing authorities are not subject to Title VII); Pet. 12-13.

That result draws support from this Court's cases suggesting that an intent to rework the federal-state balance should not be lightly inferred. See, *e.g.*, *United States* v. *Bass*, 404 U.S. 336, 349 (1971); see also Pet. App. 28a. As the court of appeals recognized, "New York acts pursuant to its traditional police powers in performing a core state function—regulating the quality of public school teachers." *Id.* at 29a. The States have traditionally licensed or certified professionals in numerous fields, including education, law, and medicine. See SED Br. 12-13.

The Constitution, of course, constrains the exercise of that traditional police power by prohibiting intentional discrimination on the basis of race (and 42 U.S.C. 1983 furnishes a cause of action to address such discrimination), but, as this Court has held, the Constitution does not proscribe disparate impacts. *Washington* v. *Davis*, 426 U.S. 229, 241-242 (1976). Indeed, this Court in *Davis* relied in part on concerns about how such liability would affect state "licensing statutes" and other traditional state functions. *Id.* at 248. Because nothing in Title VII manifests a clear intent to impose further restrictions on the States' exercise of their sovereign police power to license professionals including public school teachers, Title VII should not be read to intrude on such matters of core state authority. See *Bass*, 404 U.S. at 349; cf. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991) (holding that Congress's intent "to alter the usual constitutional balance between the States and the Federal Government" must be "unmistakably clear in the language of the statute") (citation omitted).

2. But while the inapplicability of Title VII to a State acting as a licensor, rather than an employer, supports the dismissal of the State from the action, it is not sufficient to protect *petitioner* from liability. Petitioner did not devise

and does not administer the LAST and, therefore, is not a licensing body. See Pet. App. 3a, 12a-13a; Pet. i, 13, 14. Instead, petitioner is an employer that must comply with a state law that requires it to hire and retain as full-time permanent teachers only persons who are certified by the State. See p. 3, *supra*. Petitioner thus acts *only* as respondents' employer, not as a licensing body. Nonetheless, petitioner is not liable under Title VII for complying with a facially neutral state licensing regime that limits the universe of potential employees to those who have complied with the State's requirement. Several considerations support that result.[1]

a. First, any other conclusion would effectively result in the same reworking of the federal-state balance as a regime making the States liable directly for their facially neutral licensing schemes. As discussed above, States are not forbidden by the Constitution from enacting or enforcing licensing requirements that have unintentional disparate impacts, and Title VII does not intrude on that traditional state authority. See pp. 7-8, *supra*. That state authority would be vitiated if employers could be held liable under

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[1] Respondents argue (Br. in Opp. 5-6, 15) that the LAST is not a licensing test because it applies only to public-school teachers, and because a former state employee testified to that effect at trial. The court of appeals properly rejected respondents' contention and found that "New York's decision to regulate public and private school teachers differently is reflective of the State's differing obligations with respect to public and private education." Pet. App. 38a-39a n.21. In any event, for purposes of assessing *petitioner's* liability under Title VII, the key point is that the State precludes petitioner from employing permanent teachers who have not passed the LAST. Whether a state law is labeled a "licensing" test, as opposed to some analogous exercise of the State's traditional police powers, is not necessarily dispositive. And to the extent that there is uncertainty as to whether the LAST qualifies as a licensing test, that uncertainty cuts against plenary review.

Title VII for complying with facially neutral state licensing laws, because the threat of such liability would frustrate compliance with such state laws.

Second, holding employers liable for the consequences of a state law that narrows the universe of prospective employees would conflict with basic notions of fairness and causation. It is a general principle of law that, "where [a defendant] has no ability to prevent a certain effect due to its limited [legal] authority over the relevant actions, the [defendant] cannot be considered a relevant 'cause' of the effect," and thus is not ordinarily liable. *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 770 (2004). Congress legislated against the backdrop of that practice when it enacted Title VII. Cf. *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988). And there is no evidence that Congress intended to depart from that principle in Title VII, with the indirect consequence of interfering with a State's ability to operate facially neutral licensing exams.[2]

Third, such a result is reinforced by the business-necessity defense. That defense provides an employer with a defense to a disparate impact claim if it shows that the challenged business practice is job related and consistent with business necessity. 42 U.S.C. 2000e-2(k)(1)(A)(ii). If the mandatory state licensing requirement is taken as a given, then that defense would be satisfied as a matter of course, because compliance with a valid facially neutral state mandate is a business necessity to which there is no reasonable

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[2] This requirement of causation could also be read into the prohibitions that give rise to disparate-impact liability. Cf. *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 265-266 (1992) (reading proximate causation into civil RICO action). For example, the basic liability provisions from which disparate-impact liability have been derived address an employer's effort "to limit, segregate, or classify his employees or applicants," 42 U.S.C. 2000e-2(a)(2), but it is the State's mandate, not the employer, that limits the pool of qualified applicants.

alternative. If, instead, the defense requires an inquiry into whether the test itself is justified, then the employer—who is not the one who came up with the test—would be placed in an untenable position.

An employer will seldom be in a position to determine whether a state-mandated licensing test has an impermissible disparate impact, or whether the other criteria for disparate-impact liability, such as business necessity, are satisfied. An employer that did not design or administer a state-mandated licensing test, and therefore was not privy to the data and testing methodologies underlying that test, would not realistically be in a position to know whether the test had an impermissible disparate impact under the validation methodology adopted by the court of appeals, much less to defend the test in court. Indeed, the court of appeals itself recognized the "difficulty of test validation" under its five-part inquiry. Pet. App. 45a, 48a.[3]

Fourth, under the court of appeals' holding, employers could therefore face great legal uncertainty. An employer that decided to comply with a state licensing requirement could be liable for back pay and other monetary relief under Title VII if the courts later determined that the state law created an impermissible disparate impact; but if the employer chose not to comply with the state licensing requirement, it could be liable under state law, unless the courts later agreed that the state law had an impermissible impact.

The resulting uncertainty could jeopardize not only the employer, but also the State's interest in enforcing its li-

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[3] This case does not present the hypothetical situation where "a classification that is ostensibly neutral * * * is an obvious pretext for discrimination." *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 272 (1979); see *Davis*, 426 U.S. at 241-242. There is no argument that the LAST is such a classification.

censing requirements. States have a vital interest in regulating numerous professions for a variety of reasons, including the health and safety of medical patients and others. States also have a vital interest in regulating their professionals, including public school teachers. That traditional police power would be ill-served by the court of appeals' decision, as some employers might choose not to follow important licensing requirements, and thereby prompt state enforcement actions, with the public health and safety potentially suffering during the ensuing litigation.

Similar results could occur in any number of regulated professions. Under the rationale adopted by the court of appeals' decision in this case, law firms and government legal offices could be subjected to Title VII litigation alleging that bar examinations created disparate results. Health care providers could likewise be subjected to litigation alleging disparate impact liability on the basis of medical, dental, or veterinary licensing requirements. And so on. The potentially sweeping implications of holding employers liable under Title VII for any disparate impact stemming from a state-created and administered licensing regime is another indication that Congress did not intend that result, because there is no evidence in the text or history of Title VII that Congress intended such effects.

Fifth, even attempting to try such a case would pose serious practical problems. Defendants bear the burden of proof on the business-necessity defense, 42 U.S.C. 2000e-2(k)(1)(A)(i), but an employer would be ill equipped to shoulder that burden with respect to a state-mandated licensing test for the reasons discussed above.[4] As a practi-

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[4] Congress imposed the burden on employers to establish the business-necessity defense in large part because it contemplated that the employer would have been responsible for designing or selecting the practice at issue, and thus would be in a position to shoulder the burden

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cal matter, an employer would need the State's aid to defend such a test. A State might feel compelled to intervene to defend its own licensing test, but a State would not be required to come to the employer's defense and it might just as well choose to resist discovery into the process for designing and administering a test to protect itself against a direct damages action under Section 1983. That further underscores the extent to which imposing Title VII liability in this context would be an improper end-run around state authority and would punish employers without regard to their own culpability. See SED Br. 9-10, 13. Even the court of appeals "acknowledge[d] the difficult situation that" its holding "creates for" petitioner. Pet. App. 41a.[5]

3. The court of appeals based its contrary conclusion on Section 2000e-7, which states that Title VII does not "exempt or relieve any person from any liability, duty, penalty,

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of proof in defending that practice. See H.R. Rep. No. 644, 101st Cong., 2d Sess. Pt. 2, at 14 (1990) (stating that the employer should bear the burden of proof because it "has control over the employment process, selects the practices used to make an employment decision, and is more likely to be aware of the relative costs and benefits of the practices used and of the alternative practices that were not used in making the employment decision(s)"). There is no evidence that Congress contemplated requiring an employer to bear the burden in defending a licensing test that it did not design and does not administer.

[5] The foregoing considerations lead to the conclusion that the court of appeals erred in holding that petitioner may be held liable under Title VII for complying with the mandatory state licensing test at issue. It may be possible, however, to reach that conclusion in different ways, for example, with greater or lesser emphasis on causation principles or the business-necessity defense. Any tentativeness on that score is largely a product of the manner in which this case was litigated below. Because petitioner abandoned this argument on appeal, the question was not fully aired below. See p. 17, *infra*. The fact that this issue was not fully briefed or considered below provides an independent basis for denying certiorari.

or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under" Title VII. 42 U.S.C. 2000e-7; see Pet. App. 39a. That provision, however, does not expose to liability an employer who gives effect to a state licensing requirement.

Section 2000e-7 addresses a fundamentally different question from that posed in this case—namely, it addresses when a person can be held *liable* under *state* law, and it limits the circumstances in which Title VII provides a defense. It does not address the very different question whether a person can be held liable under *Title VII* for compliance with a state law. Section 2000e-7 therefore has little or nothing to do with the question presented here. Cf. *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 280-282 (1987) (holding that Title VII did not exempt employer from liability under state anti-discrimination law). In any event, as already noted, facially neutral state licensing requirements such as the one at issue are not displaced by Title VII, because there is no indication, much less a clear statement, that Congress intended Title VII to intrude on such core state prerogatives as licensing regimes. See pp. 7-8, *supra*.[6]

Nor does respondents' reliance (Br. in Opp. 11) on Section 2000h-4 alter that conclusion. That section, which governs the Civil Rights Act of 1964 generally, including Title VII, states that the Act should not be "construed as invalidating any provision of State law unless such provision is

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[6] This case does not require the Court to determine the outer reaches of Title VII's preemptive scope. It is settled, however, that federal law preempts state laws that facially discriminate on the basis of an employee's membership in a protected class, including, for example, a facially discriminatory licensing law.

inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. 2000h-4. It is not immediately obvious what role that section plays other than to reinforce the preemptive force of the Supremacy Clause and presumably to make clear that the Act does not preempt the entire field of anti-discrimination laws. Section 2000h-4 is inapplicable because, as discussed above, the state law at issue here—a licensing requirement for public school teachers—is not inconsistent with Title VII.[7]

B. The Petition For A Writ Of Certiorari Should Be Denied

Although the court of appeals erred in concluding that petitioner may be held liable under Title VII for any disparate impact created by the LAST, this Court's review of the question presented is neither warranted nor proper at this time.

1. The court of appeals' decision does not conflict with any decisions of this Court or another court of appeals. Petitioner asserts (Pet. 12-13) a conflict with cases holding that state licensing agencies were not liable under Title VII

[7] Because petitioner does not challenge the dismissal of SED as a defendant, this case does not concern Title VII's application to a State's own employment practices. Title VII's prohibitions against intentional discrimination and disparate impacts govern a State's employment practices concerning its own employees. See *Connecticut* v. *Teal*, 457 U.S. 440, 449 (1982). As discussed, however, Title VII does not regulate the States' exercise of their traditional sovereign powers where, as here, their own employees are not concerned. Nor does this case concern the applicability of Title VII to civil service exams or other employee selection or ranking devices for federal, state, or local government employers. For example, to the extent that the unit of government that imposes the test is also the employer, Title VII would apply. Moreover, an action by the Attorney General for injunctive relief would lie even if the government that imposes the test is not the employer. See 42 U.S.C. 2000e-6(a); *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974) (written test for fire fighters), cert. denied, 421 U.S. 910 (1975).

for alleged discriminatory effects of the professional licensing exams they administered. In all but one of those cases, however, the defendants were not the plaintiffs' employers, but instead acted solely as licensing agencies. See *George* v. *New Jersey Bd. of Veterinary Med. Exam'rs*, 794 F.2d 113, 114 (3d Cir. 1986) (veterinary exam); *Haddock* v. *Board of Dental Exam'rs*, 777 F.2d 462, 463 (9th Cir. 1985) (dental exam); *Woodard* v. *Virginia Bd. of Bar Exam'rs*, 598 F.2d 1345, 1346 (4th Cir. 1979) (bar exam); *Tyler* v. *Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975) (bar exam), cert. denied, 426 U.S. 940 (1976). As discussed above, that is not the case here, where the only remaining defendant is the employer, not the licensing entity (*i.e.*, SED). See Pet. App. 40a, 41a.[8]

In the remaining case relied on by petitioner (Pet. 12-13), *Fields* v. *Hallsville Indep. Sch. Dist.*, 906 F.2d 1017 (5th Cir. 1990), cert. denied, 498 U.S. 1026 (1991), the plaintiffs sued both the state licensing agency and the local school district. *Id.* at 1018. The only claims against the

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[8] In *Association of Mexican-American Educators* v. *California*, 231 F.3d 572 (9th Cir. 2000) (en banc) (*AMAE*), the plaintiffs likewise sued only the State and the State's credentialing agency, not the local school districts that (like petitioner) directly employed teachers. *Id.* at 577, 580. The Ninth Circuit held that the State could be held liable under Title VII because "the State of California is in a theoretical *and* practical position to 'interfere' with the employment decisions of school districts." *Id.* at 582. In holding that the State of New York (*i.e.*, SED) was not a proper party to this Title VII action, the court of appeals questioned the "interference" theory of coverage applied by the Ninth Circuit, see Pet. App. 25a-30a, but ultimately concluded that, "even if this Circuit were to follow the legal framework of *AMAE*, the factual differences between the cases preclude reliance on that decision," *id.* at 30a-31a. In particular, the court of appeals explained that "[t]he relationship between the State of New York and individual local school districts is very different than the state/local relationship outlined by the Ninth Circuit in *AMAE*." *Id.* at 30a

school district, however, related to plaintiffs' alleged applications for jobs that did *not* require state certification, and the court upheld the dismissal of those claims on the fact-bound ground that the plaintiffs had not actually applied for such jobs. See *id.* at 1021-1022. Thus, *Fields* did not implicate the question presented here.

2. Moreover, on appeal petitioner appears to have abandoned the argument that an employer's compliance with state licensing requirements does not violate Title VII. As the court of appeals explained, petitioner advanced that contention in the district court. Pet. App. 39a. In the court of appeals, however, petitioner "appear[ed] to change its tack," and "[i]nstead of arguing lack of discretion," petitioner argued that it did not act as an employer in using the licensing tests. *Ibid.* As explained above, the latter argument—the only one that petitioner advanced in the court of appeals—is not persuasive. See pp. 8-9, *supra*.

The court of appeals nonetheless passed upon the question whether compliance with state law can give rise to Title VII liability, Pet. App. 39a, and this Court's "traditional rule" is that it may consider a contention that was either pressed or passed upon below. *United States* v. *Williams*, 504 U.S. 36, 41 (1992). For two reasons, however, this case is not an appropriate occasion in which to invoke such authority. First, petitioner did not merely fail to raise the argument in the lower courts. Instead, petitioner appears to have abandoned the contention by advancing it in the district court and then choosing not to renew it in the court of appeals. Cf. *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (distinguishing between the failure to assert a right in a timely fashion and the "intentional * * * abandonment of a known right") (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). Second, although the court of appeals did address the point, its discussion was conclusory and limited to two sentences. Pet. App. 39a.

3. In the circumstances, the interlocutory posture of the case also cuts against plenary review at this time. See *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for a writ of certiorari). The court of appeals remanded for further proceedings on the business-necessity question. See Pet. App. 56a. In doing so, the court declined to reach respondents' contention that petitioner had misused the LAST, and the court stated instead that, "[i]f appropriate, the district court may need to address this argument on remand." *Id.* at 16a n.9. That observation underscores the interlocutory posture of this case.

The question whether employers are liable for the disparate impacts of facially neutral state licensing requirements is the type of threshold issue this Court sometimes considers in an interlocutory posture. But here, a favorable answer to that question would not absolve petitioner of Title VII liability or resolve the case. Rather, that threshold question is related to the question whether petitioner misused the test by imposing adverse consequences on respondents that were *not* required by state law—a question that the court of appeals left for remand. See Pet. App. 16a n.9. The fact that petitioner is required by state law to give effect to a state licensing requirement such as the LAST would not provide any defense to petitioner's own misuse of the test. If respondents prevailed on the latter question, the broader question concerning an employer's compliance with *mandatory* state licensing requirements might not be squarely presented in this case. For that reason as well, this Court's plenary review is not warranted at this juncture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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